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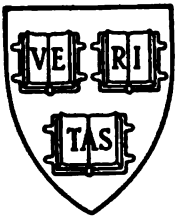

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OF

THE DEPARTMENT OF THE INTERIOR

IN

APPEALED PENSION AND BOUNTY-LAND CLAIMS;

ALSO

A TABLE OF CASES REPORTED, CITED, OVERRULED, AND MODIFIED,

AND OF

STATUTES CITED AND CONSTRUED.

VOLUME XI.

Edited by JOHN W. BIXLER.

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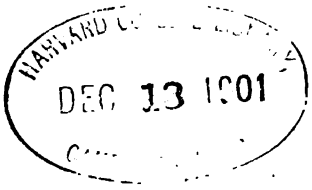

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DECISIONS RELATING TO PENSIONS.

AMPUTATION—ACT OF AUGUST 4, 1886.

JOHN B. ANDERSON.

It having been established that the amputation of soldier's arm was made "at or above the middle of the arm bone" (humerus), the failure to show the exact line of section does not affect the status of the case, and pensioner was entitled to a pension at the rate of $45 per month instead of $36, under the provisions of the act of August 4, 1886, from the date of the passage of said act to the date of his death. (See case of John W. Curran, 5 P. D., 1.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 31, 1900.

I have the honor to return herewith the papers in the case of John B. Anderson, deceased, formerly a private in Company K, Seventeenth Michigan Infantry, who was at the date of his death pensioned at $36 per month for "loss of right arm above elbow," under certificate No. 29700, issued September 15, 1886; and also the papers in the case of his widow, M. Louise Anderson, now pensioned at $24 per month, under special act of Congress, by certificate No. 440032, all of which papers were recently transmitted to the Department for consideration in connection with a motion filed April 12, 1900, for the reconsideration of a former departmental decision in the said invalid claim.

The said decision dated February 27, 1900, a copy of which is attached hereto, held, as will be noted by reference thereto, that:

The evidence in this case fails to show that soldier's arm was amputated at or above the middle of the humerus, and he was therefore not entitled to the $45 rate under the provisions of the act of August 4, 1886.

It will also be noted that the said decision holds that:

The action of the Bureau, September 15, 1886, was equivalent to an assertion by the Bureau that the amputation was not so near the shoulder joint as to prevent the use of an artificial limb, and to said action the soldier impliedly assented by his acquiescence and silence. He never asserted or attempted to prove that his amputation was at or above the middle of the humerus, or so near the shoulder joins as to prevent the use of an artificial limb, within the meaning or intent of said act of August 4, 1886, but he assented to the said Bureau action for over four and one-half years preceding his death.

In this connection—after more mature deliberation—it seems only

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necessary to state that, inasmuch as the first decision promulgated by the Department which construed the meaning of the term "so near the shoulder joint as to prevent the use of an artificial limb," used in the act of August 4, 1886, and defined the limit of the point of amputation which would bring any given case within the rule laid down therein, was the decision rendered February 28, 1891, in the case of John W. Curran (5 P. D., 1), only two weeks and three days prior to the date of the soldier's death, it is altogether improbable that he was aware of the nature of the said decision, or even of its existence. Besides which, as stated by his present widow, and shown by the evidence in the case, he was physically and mentally incapable of attempting to have the rule laid down in the said decision applied to his case. And, as to his silent acquiesence in the aforesaid Bureau action of September 15, 1886, by which his rate was increased to $36 instead of to $45 per month, it is, in the light of the foregoing statements, now frankly acknowledged that it was somewhat unreasonable to have expected that the soldier should have anticipated—by some years—what construction the Department would eventually put upon the various terms of the act of August 4, 1886, and consequently have sought to have obtained at such a time the same benefits of the provisions of the said act for which his widow is now contending in the light of existing decisions thereon. Neither is it to be presumed that all pensioners are cognizant of all laws, especially of the exact terms thereof, that may be passed by Congress for their benefit, and it is not improbable that when a new certificate of pension at the rate of $36 per month was issued to the pensioner in this case, without his having made any application therefor, that he supposed that the said rate was all that he was entitled to under the provisions of the act creating that rate; certainly we have no information to the contrary.

And, in so far as the statement in the decision hereto attached, that—

> the action of the Bureau September 15, 1886, was equivalent to an assertion by the Bureau that the amputation was not so near the shoulder joint as to prevent the use of an artificial limb—

is concerned, it is worthy of note that it was the practice of the Bureau at the time the said action was taken for the finance division to direct the reissue of certificates in this class of claims, and to fix the rate of the new issue without first referring the cases to the medical division for an advisory opinion as to the propriety of the action taken in the premises.

Furthermore, at the time the said Bureau action was taken in this case, no decision had been promulgated in which a definite construction was placed upon the intent of the phrase, "so near the shoulder joint as to prevent the use of an artificial limb;" and it was not until the aforesaid decision of February 28, 1891, in the case of John W.

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Curran was rendered that a rule was laid down defining the extreme limit of section of the humerus—in an amputated arm—that would bring the case within the purview of that portion of the act of August 4, 1886, which prescribed a rating of $45 per month. And it is in view of these facts that it can not be held that the Bureau erred at the time the said action of September 15, 1886, was taken, or that the soldier was quietly acquiescing in what he believed to be an improper action.

As a matter of coincidence, however, and of no little importance and interest as well, it is shown by the record in the case that the soldier did, as a matter of fact, entertain, even long before the passage of the act of August 4, 1886, not only views almost identical with certain terms incorporated in the said act, but that he did also to a certain extent anticipate the construction which was subsequently put upon those terms in the aforesaid Curran decision.

In a letter in his own handwriting dated August 27, 1885, and addressed to the Commissioner of Pensions, he made the following inquiries and statements:

> Does your Department construe act of March 3, 1885 (increasing pension for loss of arm at shoulder joint), literally, or according to what I think was its intent, viz, all cases where the amputation was so near the shoulder that an artificial arm can not be used? I can not see the reason or justice for drawing so fine a distinction between the two classes of cases.
>
> My stump, measuring from armpit to the tip, is about 4 inches in length—not sufficient for the use of any artificial (limb?), as I convinced myself by trial. Anything I could wear was only a dead weight and of no use whatever—in fact, was in the way, and thus worse than useless.
>
> If you rule that cases of amputation near the shoulder come within the intent of the act, will you send me necessary blanks to be filled out in making application for the increase?

The terms of the said act of March 3, 1885, were, however, of such a character as to admit of no such construction as suggested by the writer of the foregoing letter being placed thereon, and he was so advised, as appears by an indorsement dated September 29, 1885, on the jacket of the case; but it does seem to be quite a coincidence that Congress should only one year later enact a law embodying the very idea advanced in the said letter, and it also seems singularly appropriate that the writer thereof should have been entitled to the extreme benefit of the provisions of the said law, although he died without having received his full meed in that respect.

The foregoing letter of the soldier was briefly referred to in the decision attached hereto, and it was stated therein that—

> soldier was then discussing his rights under the act of March 3, 1883, under which he was then receiving the $30 rate—

but no further comment was made on the contents of the said letter. It must be confessed, however, that the statement above quoted was

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clearly error, as the soldier evidently knew that he had received all the benefit of the provisions of the act of March 3, 1883, to which he was entitled; and he expressly stated—in very legible handwriting—as is now observed, that he desired a construction of the "act of March 3, 1885," an act which had been passed but a few months prior to the date of the said letter, and to the benefits of which he argued that he was entitled.

The said act of March 3, 1885, provided, among other things:

> That all soldiers * * * who have had an arm taken off at the shoulder joint, * * * and who are now receiving pensions, shall have their pensions increased to the same amount that the law now gives to soldiers and sailors who have lost a leg at the hip joint.

The "amount" which the law then gave for the loss of a leg at the hip joint was $37.50 per month. But it will readily be seen that the soldier had no valid claim to the benefit of the provisions of the said act, as his arm had not been "taken off at the shoulder joint;" and the terms of the act itself admitted of no other construction as to their intent. This question is, however, not involved in the pending motion, and need not be further discussed herein.

And inasmuch as, as above stated, the soldier's right arm was not amputated at the shoulder joint, the one vital question to be determined—in order to bring his case within the rule laid down in the Curran case—is, Was the said arm amputated at or above the middle of the humerus?

The material facts presented in the case for consideration in this connection are as follows:

In his original declaration for pension, filed April 30, 1864, the soldier made the following allegation:

> Being engaged in battle at Knoxville, Tenn., on the 23d day of November, 1863, deponent received a shot from a musket ball, which entered his right arm about 4 inches above the elbow, passing through—came out in front—shattering the bone in its course.
>
> Deponent was taken to "Hospital No. 5," Knoxville, Tenn., where his arm was amputated two hours afterwards by an army surgeon.

The period at which the said amputation was performed shows that an "immediate amputation" was done—that is, "an amputation done during the prevalence of shock, usually within from two to six hours after the receipt of the injury necessitating the operation." (Wyeth.)

The records of the War Department, so far as the reports therefrom on file in the case show, furnish no information as to the said wound.

A report, dated May 20, 1864, from the surgeon in charge of the records of the aforesaid hospital at Knoxville, Tenn., is to the following effect:

> These records show that John B. Anderson, Company K, Seventeenth Regiment Infantry, received a gunshot wound in the right arm—the lower end of the humerus

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severely fractured, and a flesh wound of left arm at the elbow; arm amputated by Surgeon Coggeswell, of the Twenty-ninth Massachusetts Volunteer Infantry, during the siege, then in charge of the general hospital.

Although this report is not as explicit as might be desired, it confirms the statements of the soldier as to the fact that the lower portion of the right humerus was badly fractured, and that an "immediate amputation" was performed in consequence of the severity of the said wound. It is, however, not difficult of belief that the bone in the soldier's right arm was "severely fractured" when it is stated that a musket ball passed through the same. As is well known, the musket ball of those days was a bullet of very large caliber, made of soft lead, and which, when fired from a distance, upon striking any hard substance, such as a bone of the size of the humerus, would spread or flatten out, causing, in a wound of the character involved in this case, very serious damage—not a wound like that which is produced by the "Mauser" bullet of to-day, which seldom necessitates the amputation of a limb, but a wound more like that caused by the much feared and detested "dumdum" bullet, the use of which is condemned by all civilized nations. While these statements may, "at first blush," seem somewhat irrelevant to the question at issue, they are, nevertheless, believed to be of more or less importance as tending to confirm both the soldier's allegation and the hospital record in the case relative to the damage done the bone of his right arm. Therefore, taking it for granted that the humerus of a man of the soldier's height is, as stated by the medical referee in an advisory opinion in the case, about 12 inches long, and admitting the allegation of the soldier that the said musket ball passed through his right arm about 4 inches above the elbow to be true, it can readily be inferred that the bone may have been splintered an inch or two both above and below the point of entrance of the said missile, and that in performing the amputation it became necessary to cut away enough of the damaged bone and other structures in order to obtain good results, namely, a sound stump, to make the line of section at, or, as appears to have been more likely in this instance, above the middle of the humerus. Besides which fact, amputations made under such circumstances were hurriedly performed, and the same care which would be given in time of peace, especially in these days of antiseptic surgery, with a view to securing a useful stump, could not then be exercised.

Among other statements in the decision attached hereto, which must be receded from or at least qualified, are the following assertions:

Not only did soldier fail to testify to the point of amputation, or that it was so near the joint as to prevent the use of an artificial limb, but claimant is equally silent on this subject.

It does not appear that any measurement of the stump was ever made by anyone, or from what point the examining surgeon made his estimate.

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If he made it from the same point as Dr. Crummer, the five inches named by the examining surgeon would make the point of amputation the center of the average humerus.

While it is true that the soldier did "fail to testify to the point of amputation," does not his aforesaid letter of August 27, 1885, as above quoted, testify most eloquently and convincingly to the fact that he did consider that his arm had been amputated "so near the joint as to prevent the use of an artificial limb?" For does he not say therein that the stump—from armpit to tip—measured but 4 inches in length, and that it was not sufficient for any artificial contrivance? This, too, after he had, as he says, "convinced myself (himself) by trial. Anything I (he) could wear was only a dead weight and of no use whatever, in fact in the way, and thus worse than useless."

It is worthy of note, too, that this statement was made at a time when there was no provision of law which specifically considered any such condition as that certified to by the soldier—a condition that was, however, afterwards provided for by the act of August 4, 1886; but he was merely arguing, from his point of view, what he thought should be construed as the intent of the act of March 3, 1885, an act increasing the rate of pension for "loss of an arm at the shoulder joint," the provision of which, he thought, included "all cases where the amputation was so near the shoulder that an artificial limb can not be used," for, as he said:

I can not see the reason or justice for drawing so fine a distinction between the two classes of cases.

Relative to the assertion that the "claimant is equally silent on this subject," it is noted that although she had not at that time made an affidavit as to the point of amputation of the soldier's arm, she did contend in her appeal filed December 8, 1899, that her "husband's arm was amputated above the middle of the humerus," and stated "a letter which he wrote many years ago (the letter of August 27, 1885, quoted herein) shows the length of the stump," and further said:

It is also shown by the certificate of the only medical examination ever ordered by the Pension Office, and by the testimony of Dr. Crummer, who attended him in his last illness.

She also contended in her said appeal that the fact as to her husband's arm having been amputated above the middle of the humerus was clearly shown by the admissions of the medical referee in his advisory opinion in the case dated November 26, 1897.

The said advisory opinion will be set out in full herein later on.

In a recent affidavit of the appellant, executed April 9, 1900, which, of course, was not before the Department when the former decision in the case was rendered, it is shown that she did have personal knowledge as to the fact that the stump of the soldier's arm was

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actually measured, and the points of measurement are given. The affiant states, in part, as follows:

* * * I cared for and nursed the soldier many years, having opportunities for observing his arm.

The right arm was certainly amputated above the middle of the humerus. I know this by frequently seeing both arms naked, when the amputated arm appeared to be about one-third the length of the left arm from elbow to shoulder joint.

I declare on one occasion I saw my husband measure the stump with a rule, and it measured scant 4 inches in length from armpit to point of amputation.

I further declare that the soldier attempted to wear an artificial arm and found it impossible to do so. * * *

The length of the stump of the soldier's right arm was also shown by the report of the examining surgeon by whom the soldier was examined August 19, 1874, the only official medical examination ever made of the pensioner, and by the testimony of Dr. Benjamin F. Crummer, Hyland C. Hicks, and S. C. Snydam.

The said report of the examining surgeon and testimony of Dr. Crummer were referred to and commented upon in the attached decision, but the testimony of Hicks and Snydam does not appear to have been considered.

The certificate of the said medical examination states:

His right arm is off about 5 inches below the shoulder joint.

The only comment on the above report was, "It does not appear * * * from what point the examining surgeon made his estimate."

In this connection it is now deemed but proper to state that inasmuch as there was at that time, August 19, 1874, no law which provided a pension for the loss of an arm, except "* * * at the shoulder joint," and "* * * above the elbow," and, consequently, there being no instructions to examining surgeons—such as have been issued since the passage of the act of August 4, 1886—then extant, relative to the method of examining claimants for pension on account of disabilities of this character, it is not to be expected that the exact line of section, or whether it was at, above, or below the middle of the humerus, would be shown in the report of an examination made at such a time. The report of the examination in this case showed very clearly that the amputation was not "at the shoulder joint," but that it was "above the elbow." This being conclusively shown, there was no further requirement to be complied with.

It is also deemed proper to state that, in cases involving the loss of an arm, or a portion thereof, the certificate of an examining surgeon, or of a board of examining surgeons, is usually regarded as sufficient to show the point of amputation and determine the class within which the case under consideration may come; and had the report of the examination held in this case stated that the stump of the soldier's arm was 7, or 8 inches in length, instead of saying that it was about 5

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inches long, there is, I think, no question but what the said report would have been accepted as conclusively showing that the amputation had been made below the middle of the humerus; at least, testimony so positive and convincing as to show, almost beyond the peradventure of a doubt, that the finding of the examining surgeon was error would have to be furnished before his report would be regarded as having been controverted. This being true, should not the same degree of confidence be placed in the statement of the examining surgeon in this case, that the stump of the soldier's arm was but 5 inches long, and thus bring the same within the rule laid down in the aforesaid Curran decision, especially when his report is corroborated by the testimony of another physician, of three neighbors, one of whom measured the stump, and of the soldier's widow, and by his own statement made at a time long prior to the passage of the act of August 4, 1886?

Dr. Crummer, a physician of good repute, has testified in the case on two separate occasions as to the length of the stump in question. In his deposition before a special examiner, May 26, 1897, he said:

> The stump of the arm I would call a conical stump—considerable muscular atrophy. I did not measure the stump from the outside. I estimated it from the axillary fold to end of the bone—about 2 to 2½ inches.

It should be remembered that at the time Dr. Crummer had the soldier under his professional care and observation—February 25 to March 17, 1891—the latter had no claim for increase or rerating on file, the Curran decision had just been or was about to be promulgated—of which fact, however, he was probably ignorant—and there was, consequently, no occasion for his taking the measurement of the said stump. Besides which, the soldier was critically ill—on his death bed, in fact—and the doctor's attention was not especially directed to his arm, although he closely observed the same, as is shown; and it seems incredible that had the amputation been made below the middle of the humerus, thus leaving a stump over 6 inches in length, an intelligent observer, especially a physician, who is supposed to be familiar with such matters, should estimate the distance from the "axillary fold to the end of the bone" to be but 2½ inches. His testimony has not heretofore, I think, been given due weight.

S. C. Snydam, in his deposition before a special examiner, said:

> When I first met him (the soldier) he was minus the right arm; it was off close to his shoulder.

Hyland C. Kirk stated in a deposition dated April 29, 1897, that his relations with the soldier were very intimate. He further deposed and said:

> Both being soldiers, we often spoke of our army life, which led to the question of the wound which caused the amputation of his arm. The humerus was shattered badly, he said, and "in the amputation of it a bungling operation was performed,

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and the amputation being 4 or 5 inches from the shoulder, the result was, considerable dead bone was left in the wound, which acted unfavorably upon his nerves and feelings."

In a recent affidavit, filed with the pending motion, G. Smith Stanton, of Great Neck, Long Island, N. Y., states that he lived at one time at Portsmouth, Iowa, at which place the soldier was formerly station agent for the Chicago, Milwaukee and St. Paul Railway Company; that he knew the soldier well; that the latter's right arm "was off near the shoulder," and that—

* * * On one occasion, while rubbing the stub of the arm of the said Anderson in order to see if a pair of lines could be placed over said stub if occasion required said Anderson to drive a span of horses, deponent measured said stub with said deponent's hand and found the length of said stub was exactly the width of deponent's hand—4 inches.

It does not appear, after a careful search of all the papers in the case, that the medical referee has ever expressed a positive opinion that the soldier's right arm was not amputated above the middle of the humerus. In an advisory opinion, dated August 31, 1897, in the widow's claim under the general law, which was then under consideration upon appeal, the statement is made that—

The history of this case shows that soldier received a gunshot wound of the right arm, and the same was amputated between the shoulder and elbow.

A very safe and noncommittal statement, although the point of amputation was not then pertinent to the question at issue.

In a slip of reference, dated June 12, 1893, he stated:

It is of record that amputated stump was 5 inches in length.

And in an advisory opinion, dated November 26, 1897, in response to an order from the Commissioner of Pensions that he state—

* * * whether, under the decisions of the Department, this soldier was entitled to the $45 rate at the time of his death by reason of pensioned causes—

the medical referee said:

In an affidavit filed in 1864 the soldier stated that in November, 1863, he received a shot from a musket, which entered right arm about 4 inches above elbow, shattering the bone, and that arm was afterwards amputated. So far as the papers show, the only medical examination was made August 19, 1874, which shows right arm off about 5 inches below shoulder joint.

An examination of the medical authorities would seem to indicate that the average length of the humerus of a man of the soldier's height is a little over 12 inches. The examination shows stump about 5 inches long, but there is nothing to show that accurate measurements were made.

While the presumption is that the arm was amputated at or above the middle of the humerus, we are not in possession of such information as to warrant a positive opinion as to the exact point of the amputation.

The foregoing is the opinion heretofore referred to in this communication and which, it was stated, would later be set out in full herein.

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As will be observed, this most recent advisory opinion of the medical referee is quite negative as to whether the allowance of the $45 rate was warranted; and it is only by implication that he held that title to said rate had not been established.

If, as he states, "the presumption is that the arm was amputated at or above the middle of the humerus," what matters it whether "the exact point of amputation" is shown or not? As long as the facts presented in the case warrant the conclusion that the amputation was made at or above the middle of the humerus it does not appear how the status of the case would be affected by failure to show the exact line of section.

And inasmuch as there is no evidence whatever in the case even tending to show that the amputation was made below the middle of the said bone, it would seem, instead of holding that "* * * at best * * * but a mere suspicion that soldier's arm may have been amputated above the center of the humerus * * *" is created by "the evidence in this case," as was done in the decision attached hereto, that, per contra, the opinion was fully warranted that there was, in reality, only the mere shadow of a suspicion that the said operation on the soldier's right arm was not performed at or above the middle of the humerus.

Conceding, then, that the length of the bone in the soldier's right arm was, as stated by the medical referee, "a little over 12 inches" before the amputation was made, and that the stump left after the operation was, as stated by the examining surgeon and shown by the evidence, but 5 inches long, the conclusion naturally follows that the section of the humerus was made somewhat above its center. Especially is this so when it is considered that the length of the bone in the stump must, necessarily, be less than that of the stump itself; for the rule of first importance is, in amputations, after having first determined the proper line of section, to have plenty of flap; that is, the soft parts which are to form the cushion or covering of the end of the bone for its protection.

But one other statement in the decision hereto attached remains to be considered in connection with the pending motion for the reconsideration of that decision in its entirety.

It is stated therein that:

As was held in the recent decision in the case of Charles F. Borthwick, alias Franklin Brown (10 P. D., 249):

"A long line of decisions are uniform and harmonious to the effect that cases long since adjudicated by previous administrations will not be disturbed for slight or trivial reasons, nor upon mere matter of opinion as to the weight of evidence, nor upon matters involving merely an exercise of judgment or discretion, but only when glaring error, mistake, or manifest injustice is apparent from the record or the evidence."

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A number of cases were cited, in which similar rules had been laid down, as tending to sustain the views above set forth; but when it is considered that the act of August 4, 1886, was an act which provided certain specific rates of pension for certain specific causes of disability, named in the act, and that its terms were mandatory as to the payment of the said rates, the cause of disability being established, it must be acknowledged that the rules laid down in the cases cited can hardly be held to apply to the case at bar, unless, perhaps, that part of the same referring to cases in which " * * * error, mistake, or manifest injustice is apparent" may be said to be applicable to the question now under consideration.

It has been deemed advisable to discuss thus fully each phase of the questions at issue in this case in order that it may not be charged that the Department is inconsistent in reaching certain conclusions at one time, and then holding entirely different views a short time thereafter, when the conclusions in each instance are based, practically, upon the same set of facts.

It will, however, I think, be appreciated that all the material facts presented in this case have, upon review, been accorded a more careful and thorough consideration than was, perhaps, given the same when the attached decision was rendered.

But it now seems much more likely that the views enunciated in the said decision were based upon a misconception of the said facts and of the decisions and laws applicable thereto as well.

In a communication accompanying the pending motion in this case it was stated that the said motion was "in no shape intended as a reflection" on former departmental action in the premises, and it was suggested therein that--

> courts of justice, which have much less business to do, and far greater opportunities to give consideration to cases, often have their decisions reconsidered and reversed, and where there is such a multitude of work to do, * * * in reference to pension cases, it is not surprising, not to be wondered at, that in occasional instances apparent errors or mistakes have been committed.

The aptness of the foregoing statement is quite apparent, and its truth can not, of course, be questioned; and inasmuch as this Department is the highest tribunal to which an applicant for pension can appeal, upon a question of fact, for the preservation of what he may consider his just rights, any decision which may be rendered here being subject to revision only by the Department itself, the greatest care should be, and generally is, exercised before deciding adversely to the interests of a claimant for a pension, while, at the same time, the interests of the Government must be properly protected.

Enough has been said herein, I think, to show that the Department is now clearly of the opinion that the facts presented in this case warrant the conclusion that the soldier's right arm was, for pensionable

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purposes, amputated "so near the shoulder joint as to prevent the use of an artificial limb," and it is held that he should have received a pension at the rate of $45 instead of $36 per month from August 4, 1886. to the date of his death. Departmental decision of February 27, 1900, a copy of which is attached hereto, affirming the action of the Bureau in the premises, is therefore overruled and set aside; and inasmuch as the widow of the said soldier was, in accordance with the rule laid down in the case of Abram Duryee (3 P. D., 276), permitted to file an application for the rerating of her husband's claim, under the provisions of the act of August 4, 1886, it is hereby directed that such action as may be necessary looking to the readjustment of the rate in the soldier's claim, and to the payment to the said widow the difference between the rate allowed and the rate to which, as herein determined, he was entitled for the period named, shall be taken at as early a date as practicable, as the case has been made special.

The motion for the reconsideration of former departmental action in the case is, for the reasons above stated, sustained, and the papers in the case are returned herewith.

SERVICE—MILITIA.

INSTRUCTIONS.

The decisions of the Department in the cases of Randolph M. Manley (5 P. D., 295), William Bice (9 P. D., 21), Walter Morris (9. P. D., 462), and all similar cases, which recognizes certain militiamen as having been in the service of the United States, should continue to be accepted by the Bureau of Pensions as precedents under which to adjudicate pension claims of the class therein described. (See 20 Op. Atty. Genl., 322.)

Secretary E. A. Hitchcock to the Commissioner of Pensions, June 7, 1900.

Herewith I transmit a copy of an opinion this day rendered by the Assistant Attorney-General, which is given at my request in response to your letter of December 21, 1899, inquiring whether the decisions of the Department in the pension claims of Randolph M. Manley, William Bice, Walter Morris, and similar cases should be further accepted by the Pension Bureau as precedents under which to adjudicate claims of the class described in said decisions.

This opinion has received my approval, and has therefore become my response to your inquiry.

The following is the opinion of the Assistant Attorney-General above referred to: [ED.]

DEPARTMENT OF THE INTERIOR,
Washington, June 7, 1900.

The SECRETARY OF THE INTERIOR.

SIR: Under your recent reference I have considered the communication of the Commissioner of Pensions of December 21, 1899, inquir-

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ing whether the decisions of the Department in the pension claims of Randolph M. Manley (5 P. D., 295), William Bice (9 P. D., 21), Walter Morris (9 P. D., 462), and similar cases should be further accepted by the Pension Bureau as precedents under which to adjudicate claims of the class described in said decisions.

After careful consideration of these departmental decisions, and of the opinions of Assistant Attorney-General Shields (5 P. D., 310) and Attorney-General Miller (20 Op. A. G., 322), and of the act of Congress of April 12, 1866 (14 Stat., 32), which recognize these militiamen as having been "in the service of the United States," I am of opinion that said departmental decisions should continue to be accepted by the Bureau of Pensions as precedents under which to adjudicate pension claims of the class therein described.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

Approved June 7, 1900.

E. A. HITCHCOCK, *Secretary.*

DISCHARGE—DESERTION—PRACTICE.

JEROME WOODIN, ALIAS FRANK ALLEN.

In 1891 pension was allowed under the act of June 27, 1890, when the practice required only a final honorable discharge from the service; therefore the desertion of an applicant for pension under said act from his first service was no bar to pension. The practice having been changed so as to require an honorable discharge from all service contracted to be performed during the war of the rebellion, pensioner's name was properly dropped from the rolls on the ground that he was a deserter.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 8, 1900.

Jerome (borne on the rolls of his companies as Wm. J.) Woodin, late of Companies H and D, Ninetieth New York Infantry, alias Frank Allen, late landsman, United States Navy, has appealed, November 14, 1898, from the refusal, May 13, 1898, to restore his name to the rolls under the act of June 27, 1890, from which it had been dropped December 11, 1897. The dropping was on the ground that pensioner had not received a discharge from all the service which he contracted to render during the war of the rebellion, being a deserter from the first above-named service when he enlisted in the Navy. The charge of desertion was subsequently removed, but the denial of restoration was on the ground that a ratable degree of disability under said act of June 27, 1890, no longer existed.

The basis of appeal is that a pensionable disability does exist, and

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the board of surgeons that last examined him did him an injustice in reporting otherwise. And he asks that he be sent before another board. No reference is made in this appeal to the rejection of the claim under the general law. The only question therefore to be determined is whether the action in the case under the act of June 27, 1890, as taken was regular and justified by the facts.

A brief summary of the history of these claims will give a clearer understanding of the reasons for and propriety of the action taken. The appellant's first application was filed February 25, 1869, and alleged sciatica of the right leg as having been contracted during his service on the gunboat *Red Rover* in the fall or winter of 1864. In another application, filed November 12, 1872, he alleged that his disability was total stiffness of right leg, caused by taking mercury while serving on said vessel, and his disease was called by the surgeons sciatic rheumatism. That claim was rejected September 27, 1873, "upon the report of the special examiner." Said report was chiefly a recapitulation of the facts shown by the record of appellant's service in both the Army and Navy, with the expression of an opinion that the alleged disability was not a result of the naval service, and, as he was a deserter from the army service, he was not pensionable for any disability contracted therein.

The record of these services shows the following: He enlisted November 10, 1861, in Company H, Ninetieth New York Infantry, as William J. Woodin; was present to June, 1862, when he was sentenced "to forfeit fifteen days' pay by order of a regimental court-martial;" was transferred to Company E, and on rolls of that company for May and June, 1863, was reported sick in hospital at Baton Rouge; on the rolls for January and February, 1864, he was reported as "deserter from Port Hudson, La., June 13, 1863, with full equipments; due United States for equipments lost, $24.46." On regimental returns for February, 1864, he was reported "deserted June 13, 1863, at Port Hudson; improperly reported absent sick." Not borne on the rolls as Jerome. The medical records covering the foregoing service show that he was treated in regimental hospital in October, 1862; December, 1862; twice in January, 1863, and in March, 1863. His disabilities were vermes, acute diarrhea, bronchitis, rheumatism, and tertian intermittent fever.

He enlisted as Frank Allen, landsman, on board the *Red Rover*, at Memphis, Tenn., September 7, 1864, was carried on the rolls of said vessel to June 15, 1865, when discharged. During this service the medical record shows him—

admitted at naval station, Mound City, Ill. (as William Allen, acting boatswain), January 20, 1865, with erysipelas; disease affects nearly the whole right leg; pil. cath. co., iodid, potass. Dovers powder. Nausea and vomiting. Gastric and intestinal disorder: Tr. opii. camph. Origin not stated. Discharged February 1, 1865, to

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Red Rover. Admitted February 1, 1865, with erysipelas, leg. No hospital ticket on file. Journal states: "His disease originated in the line of duty, having been contracted by exposure to climatic influences." No record of treatment. Discharged February 25, 1865, to duty. Naval station, Mound City, Ill. Admitted March 4, 1865, with dropsy, the result of diseased liver. No record of origin or treatment. Discharged March 8, 1865; condemned by medical survey and granted fifteen days' leave. No record of survey on file.

Another statement is that—

the name of Frank Allen does not appear on the journal of the *Red Rover*, but as the disease for which William Allen was treated appears to agree with that claimed by applicant it is presumed that the medical officer may have made an error in entering the name.

Claimant does not appear to have made any further effort to prosecute this claim after its rejection in 1873, beyond the filing of a few affidavits as to his condition after discharge. It was taken up again, however, and rejected December 11, 1897, on the ground that when he enlisted in the Navy claimant was a deserter from Company E, Ninetieth New York Infantry, as shown by the record of the War Department. And once again said claim was considered and the ground of rejection was changed February 18, 1899, to "no ratable disability from sciatica of right leg since discharge."

In the meantime claimant had filed, July 14, 1890, a claim for pension under the act of June 27, 1890, alleging disability from sciatica rheumatism and disease of heart. The claim was admitted in July, 1891, at $6 per month, but for different disabilities than those alleged, the medical examination only showing catarrh and lumbago. This allowance was under the practice of the Bureau, sanctioned by rulings of the Department, requiring only that a final honorable discharge from rebellion service should be shown. Subsequently this practice and the rulings were abrogated by departmental decisions which held that the law required an honorable discharge of a claimant under said act from any and all services engaged to be performed by him.

Under this construction the pensioner, being borne on the record as a deserter from his army service, was notified that his name would be dropped from the rolls, and such action was consummated, as before indicated, on December 11, 1897. Thereupon he filed, February 3, 1898, an application for reconsideration, declaring that he was never a deserter, and the charge against him had been removed. A call being made upon the War Department for the purpose of verifying his statement, it was reported in response to said call, that—

the charge of desertion of June 13, 1863, against this man is removed and he is discharged to date June 13, 1863, under the provisions of section 3 of the act of Congress, approved March 2, 1889.

The status of the claimant being thus changed he was ordered for medical examination, with a view to determining whether he was still

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entitled under the act of June 27, 1890, by reason of incapacity for earning his support by manual labor. The following certificate dated March 30, 1898, describes his condition at that time:

Pulse rate, 72; respiration, 16; temperature, 98¼; height, 5 feet 7 inches; weight, 161 pounds; age, 54 years.

General appearance and muscular development good—skin normal, tongue clean, and hands calloused. No evidence of sciatica or of rheumatism.

Apex of heart 1 inch below and 2 inches internal to left nipple, evident only on palpation; area of dullness not increased; rhythm normal, and no murmurs; no hypertrophy, dilatation, dyspnœa, œdema, or cyanosis.

Pulse, standing, 80, and after brisk exercise 88; chest measures 34 inches expiration, and 37½ inches inspiration. Chest symmetrical; breathing free and easy; no abnormal sounds discovered on auscultation and no dullness on percussion.

Urine—acid—sp. gr. 1020, no albumen (heat and HNO_3) and no sugar (Fehling), no evidence of piles, congestion of hemorrhoidal vessels, fissures, fistulæ, prolapse, or ulceration.

Trachoma both lids right eye from burn of lime. No evidence of general debility.

All other joints, muscles, tendons, and nerves found normal. No evidence of other disabilities or of vicious habits.

No disabilities found sufficient to warrant a rating.

As will be seen a ratable disability was not shown, and the claim was rejected for that reason May 7, 1898. Some question was raised in the Bureau as to the correctness and regularity of this action, the claim being one for restoration. The chief of the law division was called upon for an opinion upon the matter, and responded with this statement:

If the charge of desertion had been removed from the record of this soldier at the date of his dropping in December, 1897, he should be restored to the rolls, and if found to be not pensionably disabled, he should be given the legal notice under the act of December 21, 1893, to drop his name from the rolls. If, however, at the time the pensioner's name was dropped from the rolls in December, 1897, the charge of desertion standing against him had not been removed, and the records of the War Department showed that he was a deserter, he was legally dropped from the rolls, and should not be restored; and before his name can be again placed on the rolls, he must establish new title to pension.

This is regarded as a correct statement of the rule applicable to such situation, and, as will be observed, the rule was followed in the action taken. That is, as far as was known at the time of the dropping, the charge of desertion was still standing against the soldier, and under the law, as it had been construed, the dropping was not only proper but imperative. So, also, in adjudicating the claim for restoration it was within the province of proper authority and a duty to ascertain whether claimant was still pensionably disabled, and when it was found he was not, to reject the claim.

There is one question which suggests itself in connection with this review of the adjudication above mentioned, and which might have been pertinent, but which, under the existing circumstances of the case, is not deemed important. This question pertains to the correctness of

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the information regarding claimant's desertion at the time his name was dropped from the rolls. It has been stated that as far as then known the charge of desertion was still standing on the record. But, the report showing this fact was made in 1873. No report had been called for in connection with the proposition to stop payment. Very soon after the dropping claimant filed the application for restoration, declaring that the charge of desertion had been removed, and when a report was received later this declaration was verified. It is true the report reads, "the charge of desertion is removed," as if it was an action then taken, but the previous declaration of claimant indicates that the removal may have been accomplished sometime before.

If it were true that the charge had been removed prior to the dropping, and that such dropping was actually not warranted at the time upon the basis of such charge the failure of the Bureau to ascertain the facts and the action taken would be considered in ordinary circumstances, such error as would justify the restoration of the pension and payment from the date of dropping, provided the claimant had been ratably disabled. And just here is the saving clause in this matter, that claimant is shown not to have been so disabled and was not entitled on the score of incapacity to earn his support by manual labor, so that whether the ground of dropping was altogether the true one or not, he will not be restored merely to cure an irregularity. The fact remains that he was not then entitled and it could not be seriously contended that the Government should be required to restore and pay a pension for which there was no title, upon a technicality.

The reasonableness of this position is self-apparent. Besides, there is ample authority for it in the laws, which confer large discretion upon the Commissioner of Pensions in the matter of stopping or reducing pensions when found to be without proper title; also, in the decisions of the Department in cases of similar import. But it is not certain that this question properly arises in this case, and it is referred to only to meet the objection if it should come up in the future by reason of a change in the record as it now exists in the claim.

There is still another matter which might be important in the event the claimant should be found pensionable in the future. In the report of the War Department relative to the removal of the charge of desertion it is stated that such action was taken "under the provisions of the third section of the act of March 2, 1889." That section provides, among other things, that "the absence from the service (of any beneficiary of said law) did not exceed four months." The reports now on file show that this soldier was absent at least nine, if not more than fourteen months; and, while it is not within the province of this Department to call in question the propriety of the action of another Department or, necessarily, to know the basis on which such action is taken, yet it is always proper to request a full report from the records

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touching the military or naval service of a claimant for pension. Thus, should this claim come up for adjudication again, such report should be called for so as to secure full information on the matters referred to.

As already indicated, the action in the claim under the act of June 27, 1890, was proper and is affirmed.

RATE—DEPENDENT RELATIVES—COMMENCEMENT.

ELIZA HODGMAN (MOTHER).

A dependent mother who claims by reason of death, of service origin, is entitled to a rating of but $12 per month when the origin of the death cause was contracted while soldier was a private, notwithstanding the fact that said soldier afterwards became a commissioned officer.

The right to a pension is not a vested right. The date of commencement of a dependent mother's pension, under the general law, is governed by the act of March 3, 1879.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. June 14, 1900.

Eliza, as dependent mother of Clinton E. Hodgman, formerly a private and sergeant in Company K, Twenty-second New York Volunteer Infantry, and later a second lieutenant in Company E, of said regiment, filed her applications under both laws on October 12, 1897, the one under the act of June 27, 1890, being admitted on May 5, 1898, at $12 per month, to date from October 12, 1897. An appeal filed on August 15, 1898, contends that appellant is entitled to $15 per month, to date from soldier's discharge.

Soldier was enrolled on May 16, 1861, as a private in Company K aforesaid, and was promoted to sergeant and transferred to Company E, same regiment, on October 4, 1862, and was mustered in as a second lieutenant on December 22, 1862, being discharged on May 31, 1863. During his service as private and sergeant he contracted rheumatism, which resulted in disease of heart, from which he died on June 30, 1870. The above are all of the material accepted facts.

Counsel raises two issues of law, viz: First, that the soldier being a second lieutenant at the time of discharge, his dependent mother is entitled to a pension in accordance with said rank, counsel citing the act of July 14, 1862, and section 4707, Revised Statutes, in support of the contention. Second, that the pension should date from soldier's discharge, relying upon section 3 of the act of July 14, 1862, in support thereof. He contends, also, that the act of March 3, 1879, has no application, the first-mentioned act being part of soldier's enlistment contract, and that an application of the act of March 3, 1879, would be in violation of section 9 of article 1 of the Constitution of the

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United States, which provides that "no bill of attainder or ex post facto law shall be passed."

In considering the first proposition it is noted that the Commissioner of Pensions calls the attention of counsel to section 4696, Revised Statutes, asserting that this section is to be read in connection with section 4707, Revised Statutes. To this counsel replies that section 4696 relates entirely "to the claim of an officer, and in no manner regulates or determines the pension which his dependent mother shall receive." I am of the opinion that counsel's point, in the main, is well taken; for I see no necessity of taking section 4696 into consideration in the case. The basis of claimant's title is not dependent upon section 4696, and said section could only affect the case, if at all, in a very incidental manner. Claimant's title is based on section 4707, Revised Statutes, which, in turn, is but a designation of persons entitled to a pension, who become so entitled by reason of their relationship or affinity to those mentioned in sections 4692 and 4693, Revised Statutes. These last two sections place title in a soldier by reason of "disease contracted while in the service of the United States and in the line of duty," and section 4707 carries the right, upon the death of the soldier by reason of such disease and under such circumstances, to the mother of such soldier. The claimant, then, must rest the foundation of her title upon that part of the Revised Statutes which grants the title to her son, which, avoiding all collateral phases of the question, is the first subdivision of section 4693, Revised Statutes.

Now, admitting that the son was entitled to a pension under section 4693, Revised Statutes, we find by the facts in this case that this claimant is thereby entitled; and the first query is, How much of a pension? In other words, What is the rate? Section 4707 says "the same pension as such person (soldier) would have been entitled to had he been totally disabled," and it being admitted that soldier received his injury prior to his becoming a commissioned officer, there is but one possible rate under section 4695, and that is $8 per month. This rate was the only rate for the dependent mother of one who died by reason of army service, the disabling cause being incurred or contracted as a private, until 1886, when, on March 19, 1886, this rate was increased to $12 per month.

Attorney's argument upon this point is virtually based upon the proposition that claimant's son, because he was an "officer" at discharge, would have been entitled to a pension according to such official rank, quoting in support thereof section 3 of the act of July 14, 1862, and in which is found the following:

> The mother shall be entitled to receive the same pension as such officer or other person would have been entitled to had he been totally disabled.

No such proposition can be deduced from the language of the statute save by a deceptive use of the sense of its words; for it was not

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as an "officer" that the son could have been pensioned, but it was as a private that he contracted the disability, and it was only as a private that he could have been pensioned. The soldier would have had title as an "enlisted man" under subdivision first, section 4693, Revised Statutes. His rate would have been $8 per month under section 4695, Revised Statutes. His dependent mother, under the facts, would have been entitled to said rate under section 4707, and said rate was increased to $12 per month under the act of March 19, 1886.

The contention that appellant is entitled to $15 per month is not supported by the law.

The specific contention of the appeal is to the effect that the pension should commence at the date of soldier's discharge, and in this connection counsel says:

> As to the second proposition, we may admit, without jeopardizing said proposition, that, standing alone, the act of March 3, 1879, page 34 of said Revision, might make the pension to commence from the date of receipt of the application at Washington, and therefore commenced at the correct date; but the statute referred to has no possible application to this case for the reason that the soldier was promoted after the pension act of July 14, 1862, went into effect; and therefore the said section 3 became a part of his contract of enlistment, and could not be changed in any respect by Congress at any time thereafter. As well could Congress pass a law requiring this soldier, if living, to pay back a part of his monthly pay as to undertake, by subsequent act, to vary and alter the contract which became absolutely binding on the United States when the officer accepted promotion.

This argument is based, as is readily seen, upon the theory that the right to a pension is a part of the enlistment contract, and being contractual, is therefore a vested right. This theory, although upheld by many well versed in law, is not tenable, for it has been declared unsound by the Supreme Court of the United States. In the case of United States *v.* Teller (107 U. S., 64) the court said: "Pensions are the bounty of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion;" citing in support of such doctrine the opinion in the case of Walton *v.* Cotton (17 How., 355).

The act of March 3, 1879, section 2, is clear and unambiguous in its terms and needs no construction. It provides as to "all pensions" (save those of insane persons and minors within 16 years of age) that a claim filed subsequent to July 1, 1880, shall, if allowed, commence from the date of the filing of the application; thereby amending that portion of section 4707, Revised Statutes, which fixes the date of commencement not as the date of discharge, but as the date of death.

The second ground of appeal is clearly in contravention of law.

The action appealed from is affirmed.

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SERVICE—MEXICAN WAR.

META THORNTON (WIDOW).

It appearing from the official record of the military service of the deceased soldier during the Mexican war, and from the testimony on file in this case, that the soldier was duly enlisted for service in the war with Mexico as a recruit for a regiment then on duty in Mexico, and that he served for a term of more than sixty days under orders and "en route" to the seat of war to join his command, such service fulfilled the conditions of pensionable title required by the provisions of the act of January 29, 1887, and entitles his widow to pension thereunder.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 18, 1900.

Meta Thornton filed in the Pension Bureau, on January 14, 1899, an application for pension under the provisions of the act of January 29, 1887, as widow of Henry F. Thornton (deceased), late an unassigned recruit for the First Regiment of Virginia Volunteers. Mexican war, alleging that said soldier had been duly enlisted for military service in said war as a recruit for said regiment, and had served as such for more than sixty days under orders and "en route" to join his command at the seat of war in Mexico, had been honorably discharged from said service, and had died on December 13, 1898, leaving her as his widow surviving.

Said application for widow's pension was rejected on March 28, 1899, upon the ground that the deceased soldier was not shown to have served for sixty days with the Army of the United States in Mexico, or on the coast or frontier thereof, or en route thereto, as required by the provisions of the act of January 29, 1887, to entitle his widow to pension thereunder.

From said action appeal was taken on May 18, 1899.

The official military records of the War Department show that the deceased soldier was duly enlisted on December 2, 1847, as a recruit for the First Virginia Volunteers for service in the war with Mexico, and was mustered into the military service of the United States at Bowling Green, Va., on December 31, 1847, to date from day of enlistment; was forwarded, under orders to join his command in Mexico, with detachment of unassigned recruits to Fort Monroe, Va.; rolls of said detachment at Fort Monroe, Va., for January and February, 1848, show him present, and that he was mustered out of the service and honorably discharged with said detachment of recruits at Fort Monroe, Va., on February 29, 1848.

The length of the soldier's term of military service from date of enlistment to discharge, as shown by the foregoing official record, was two months and twenty-eight days. The records of the War Department also show that during the whole time of the soldier's service the

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First Virginia Volunteers, for which he was recruited, was on active service in the field in Mexico, and was stationed at Buena Vista, Mexico.

The testimony on file in this case relative to the soldier's Mexican war service corresponds in all respects with the foregoing official record, and shows that he was enlisted for the Mexican war in December, 1847, at Bowling Green, Va., as a recruit for the First Virginia Volunteers, which regiment was then in Mexico; that he was forwarded to Fort Monroe, Va., where he joined a detachment of recruits for the same regiment under orders to join their command in Mexico; that he remained there as a member of said detachment, awaiting transportation and orders to leave for Mexico, until the date of his muster out of the service and discharge.

The beneficiaries under the provisions of the act of January 29, 1887, are the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval forces of the United States—

who, being duly enlisted, actually served for sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto in the war with that nation, or were actually engaged in a battle in said war and were honorably discharged, * * * and the surviving widows of such officers and enlisted men.

Under the provisions of said act, and under the foregoing official record and proof of military service, the deceased husband of this appellant was in October, 1887, allowed a pension as a Mexican war survivor from the date of said act, January 29, 1887, upon the basis of a military service of more than sixty days "en route" to the seat of war during the war with Mexico. In July, 1893, the soldier's pension was "briefed" for dropping; and an application filed by him for the increase of said pension provided by the act of January 5, 1893, was also "briefed" for rejection upon the same grounds upon which this claim of his widow for pension has been rejected; but such contemplated action appears to have been abandoned and never carried out, for in December of the same year increase of his pension was allowed the soldier under the provisions of the act of January 5, 1893, and on March 12, 1897, he was allowed a further increase to $16 per month by a special act of Congress, which rating he was receiving at the date of his death.

It is a most singular circumstance that this soldier's Mexican war service should have been found sufficient to entitle him to a pension under the provisions of the act of January 29, 1887, in October, 1887, and again in December, 1893, when he was allowed increase under the provisions of the act of January 5, 1893, and in March, 1899, with no change whatever in the law or the requirements for pensionable title thereunder, the claim of his widow for pension under said act should be rejected because of insufficient service by the soldier. If this claim of the soldier's widow was properly rejected, it necessarily follows

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that the soldier had no title to the pension which was allowed and paid to him from January 29, 1887, to December 13, 1898, the date of his death, for under the provisions of the act of January 29, 1887, the surviving widow of the pensioner thereunder succeeds to the pension and her right and title thereto is based upon the same service; the statute prescribes no additional requirements whatever, relative to the nature or extent of the soldier's service, as a basis for her title to pension.

This case is precisely similar in all respects, both as to the nature and character of the military service rendered by the soldier and the question of pensionable title under the provisions of the act of January 29, 1887, to the case of Emily J., widow of Aaron D. Lyons, unassigned recruit, Third United States Dragoons, Mexican war, No. 13076 (Letter Book No. 261, p. 288), decided by this Department on November 20, 1897. In deciding said case the Department uses the following language:

After a careful examination of the evidence in this case, and in view of a just and reasonable construction of the law, it is believed that the soldier's claim was properly allowed in 1888, and upon the same service his widow is equally entitled to the benefits of said act.

It is obvious as a prerequisite to pension to the soldier or his widow, under the act of January 29, 1887, some one of the specified conditions must be complied with.

Upon reference to the record of this soldier it is apparent that the only condition prescribed under which pension could be granted was service of sixty days en route to Mexico, the seat of war.

The first requirement is, the claimant must have been "duly enlisted," which may be in any branch of the military or naval service.

The record shows that this soldier was enlisted February 23, 1848, "for the war," at Washington, Ind., for the Third United States Dragoons. In his declaration for pension filed July 30, 1887, the soldier swears that he enlisted at Washington, Ind., January —, 1848, in a company commanded by Lemuel Ford, in the Third United States Dragoons. Witnesses who enlisted at the same time in the same command testify that they enlisted at Vincennes, Ind., in Capt. Lemuel Ford's company, Third Dragoons, and by order of Captain Ford they started on the way to Mexico by way of Evansville, Ind., and from Evansville they went to Jefferson Barracks, Mo.; that the sole purpose of said enlistment was to participate in the war with Mexico. That the detachment remained at Jefferson Barracks, under orders, and performed all duties under instructions until discharged.

This testimony is fully corroborated by the soldier's record, and in addition the record shows that the Third United States Dragoons was in Mexico at the seat of war at that time, and that the soldier was paid from date of enlistment to date of discharge. It must therefore be conceded that this soldier was "duly enlisted" in an organization for the Mexican war, and under orders started en route for the seat of war. That he was "en route thereto," while traveling under orders from Evansville, Ind., to Jefferson Barracks, Mo., is practically admitted in your communication to this claimant under date of January 4, 1896, but that is held to be the limit of his service in that direction.

If the Third United States Dragoons had been engaged elsewhere than in Mexico at that time, or the soldier had been detached from the organization in which he enlisted and assigned permanently to other duty having no connection directly or

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indirectly with the Mexican war service, or for any reason he had been diverted from the original purpose of his enlistment, there would be reasonable ground for the conclusion that his service was insufficient to comply with the requirements of law.

But such is not the case. He was duly enlisted as a recruit for a regiment engaged in the Mexican war, and his services were accepted. He was forwarded from the place of enlistment en route to Mexico, and with his detachment he was detained and held at Jefferson Barracks, Mo., by military authority. He was carried on the muster roll of the detachment of said regiment from date of enlistment to the date of his discharge as "present." He was mustered out, and paid for four months and fifteen days' service as a member of said regiment. It is true that he, with the detachment, did not reach the regiment in Mexico, the point of destination, but it must be admitted he was en route thereto, and that he was delayed without fault or neglect on his part and in obedience to military orders.

Under these conditions it would be unreasonable and inconsistent to assume that this soldier's enlistment, and service which commenced at the date of enlistment, had no direct connection with the military operations of that war.

In the case of Elizabeth Young, June 26, 1897 (9 P. D., 44), a similar case, it was held as follows:

"The period of time included in the term 'en route thereto' in the act of January 29, 1887, commences at the date of soldier's enlistment, when his service in the war with Mexico conforms in other respects with the requirements of the terms of said act, and where the soldier is not responsible or chargeable with delay in finally reaching Mexico, the coasts or frontiers thereof."

The period of this soldier's service exceeds the minimum service required under the law, and as the evidence shows he was en route to the seat of war in obedience to military authority, I am clearly of the opinion that said service should be considered a sufficient compliance with the law.

The foregoing language is directly applicable to the facts of this case and correctly states the law.

This case, as well as the one from which the foregoing citation was made, is to be distinguished from that class of cases arising under the same act where the soldier is shown to have enlisted in some organization which was in process of being formed and organized for military service in the Mexican war, but which never left the place of organization or rendezvous under orders to proceed to the seat of war in Mexico, or where the soldier remained on duty at the place of rendezvous after his command had been ordered to Mexico and never received orders to rejoin it, or where he had been discharged the service prior to the date upon which his command had left the place of organization under orders to proceed to Mexico. In such, and all similar cases, it has been properly held by the Department that the soldier could not be considered as having ever been "en route" to Mexico, and that such service failed to meet the requirements of the act of January 29, 1887. In this case, however, as in the case of Lyons (supra), the soldier was enlisted as a recruit for a regiment then on active service at the seat of war in Mexico, and the record and the testimony both show that he left the place of his enlistment and muster into the service under orders to join his regiment in Mexico. The fact that he was halted by military authority at Fort Monroe, Va.,

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and remained there, does not affect the case at all. He was at Fort Monroe, Va., as a member of a detachment of recruits for his regiment and remained there in obedience to orders, but he was unquestionably at that time "en route" to join his regiment, since the only reason that could possibly be assigned for said detachment of recruits to which he belonged being at Fort Monroe, Va., at that time, was that they were assembled or stationed at that place on their way to join their command in Mexico, and for the purpose of being transported and forwarded to the seat of war. The fact that they were not thus forwarded, and did not ultimately join the regiment in Mexico, does not alter the unquestionable fact that they were, during all the time they were held at Fort Monroe, Va., under orders to join their regiment at the seat of war, "en route" to Mexico.

The only reasonable construction that can be put upon the service of the deceased soldier, as shown by the evidence in this case, is that he should be considered as "en route" to Mexico from the date of his enlistment to the date of his discharge, and as said service covered a period of more than sixty days it fully complied with the requirements of the act of January 29, 1887, and was a pensionable service thereunder.

Consequently, the allowance and payment of pension to the soldier as a Mexican war survivor under the provisions of said act was proper and in accordance with the law, but the rejection of the claim of his widow for pension upon the ground stated was clearly erroneous, and said action of rejection is hereby set aside and reversed, and you are requested to cause said widow's claim to be reopened and readjudicated in accordance with the views herein expressed.

ATTORNEYSHIP—FORFEITURE—RECOGNITION.

JOHN QUINN (CLAIMANT).

J. B. CRALLE & CO. (ATTORNEYS).

The following rule laid down in the case of Ezra Garner, dated November 26, 1898, and in the case of John Dennert, dated July 30, 1898, is affirmed, viz: Where an attorney who has been recognized by the Bureau subsequently has been denied recognition does not appeal for recognition within a reasonable time thereafter, he thereby forfeits all rights he may have in the case from the time he was so notified.

The rule does not contemplate attorneys contesting for recognition whose rights would become forfeited upon their failure to call up a case at proper intervals.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 22, 1900.

The appellants, J. B. Cralle & Co., of Washington, D. C., November 16, 1899, entered an appeal from the action of the Bureau in the

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matter of fee on the issue of September 19, 1896, in the claim for pension under the act of June 27, 1890, of John Quinn, who served in Company E, Ninety-eighth New York Volunteer Infantry.

In behalf of John Quinn, H. D. Phillips, of Washington, D. C., August 28, 1890, filed a claim for pension under the act of June 27, 1890. Thereafter Mr. Phillips rendered no further material service in the claim. The appellants, July 16, 1892, filed a second declaration in the claim, which contained a power of attorney in their favor. They filed evidence (claimant's statements) August 15, 1892, and January, 1893, and calls for status December 7, 1893, October 5, 1894, and June 12, 1898.

C. E. Foote, of Kalamazoo, Mich., June 5, 1894, filed a third declaration for pension under the act of June 27, 1890, which contained a power of attorney in his favor, and on January 27, 1896, filed evidence in response to call of the Bureau, which completed the claim.

On July 5, 1894, Mr. Foote and the appellants were informed that they were not entitled to recognition.

Certificate issued September 19, 1896, in the claim to allow pension from August 28, 1890, date of filing declaration for pension to Mr. Phillips. On said issue no fee was paid to Messrs. Cralle & Co., hence this appeal.

The Bureau has assigned two grounds of neglect upon the part of the appellants, either of which might work a forfeiture of their rights. One cause is their failure for one year to enter an appeal from the action of the Bureau in denying them recognition. In support of this view the Bureau cites the decisions of this Department in the following cases: Ezra Garner, certificate No. 543682, dated November 25, 1898 (32 F. P. L. Bk., 257); John Dennert, certificate No. 407977, dated July 30, 1898 (32 F. P. L. Bk., 199).

In the cases cited it was held, in substance, that where an attorney had been recognized by the Bureau and subsequently was denied further recognition, unless the attorney entered an appeal from said action he forfeited all rights he may have had in the claim.

This conclusion was reached upon reasoning that it was the province of the Bureau to decide whether an attorney is entitled to recognition; and where an attorney who has been denied further recognition acquiesces in such action, all his rights at once terminate; for, having a good title to recognition, he would profit by the services of other attorneys who were subsequently recognized by the Bureau and completed the case or rendered material service, were the former permitted to assert his claim to recognition after the lapse of so long a time and notice of the adverse action of the Bureau. Hence it was held by the Department that unless such an attorney entered an appeal for recognition within a reasonable time from the adverse action of the Bureau, his rights in a case thereupon terminated. This view still

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meets with the approval of the Department, and the decisions in the cases of Ezra Garner and John Dennert are hereby adhered to.

However, it was not proposed that said rule should apply to other conditions than those enumerated in the rule itself. One of these conditions is that the attorney whose title to recognition has been denied shall have been recognized by the Bureau. The rule does not include a case where an attorney has an inchoate right to, or has become entitled to, recognition, though he has not been recognized by the Bureau. For such rights of an attorney to or to become entitled to recognition may be preserved by calls for status. Hence to require an attorney thus entitled to enter an appeal would compel him to submit his case when not complete and when the well-known rules of practice point out a method by which he can acquire recognition if a vacancy in the attorneyship occurs in one instance, and preserve his title to recognition in the other, though he has not been recognized by the Bureau. In other words, the rule has reference to attorneys of record in a case and not to attorneys who are contesting for recognition.

For the foregoing reasons the appellants can not properly be denied recognition under the rule laid down in the Garner and Dennert cases.

The second ground upon which the Bureau denied the appellants recognition is that they forfeited their rights through their failure to call up the case at proper intervals.

The claim was filed by Mr. Phillips August 28, 1890. The appellants contested his rights to recognition under a power of attorney in their favor contained in a declaration filed by them July 16, 1892. In order for them to acquire recognition by the Bureau it was incumbent upon them to file evidence necessary to prima facie establish the case and then call it up, as they would be required to do were they the original attorneys in the case, or at least to render material service or call up the case at intervals of one year until recognized by the Bureau or until the claim was allowed. The appellants did neither. They filed evidence and call slips at regular intervals from the time they appeared in the claim to October 5, 1894, but during the following year (ending October 5, 1895) they did not perform any service, either material or formal. At that time, and subsequently, in order to prima facie establish a claim for pension under the act of June 27, 1890, it was incumbent upon an attorney to file evidence as to nonvicious habits, and this without a call by the Bureau. There was no evidence as to nonvicious habits filed in this claim on or prior to October 5, 1895; so the case was not then prima facie completed. Therefore the appellants became in default under rule 12 through their failure to take any action in the prosecution of the case and their failure to call up the case during the year ending October 5, 1895. The rule as to evidence required for prima facie establishing a case under the act of June 27, 1890, is now materially different from

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the rule as here stated. The rule now governing is found in the case, Jerome B. Fetterly (10 P. D., 460). But the rule governing the practice in this particular as to filing of evidence as to nonvicious habits in claims for pension under the act of June 27, 1890, to a period subsequent to 1895, was as herein set forth. It is under the practice as it then was that the question of neglect on the part of the appellants arose and is determined.

Upon the default of the appellants the power of attorney in favor of Mr. Foote became operative, as there was no longer any bar to his recognition under his contract with the claimant. He therefore superseded them in the attorneyship. Subsequently he was recognized by the Bureau as the attorney of the claimant and filed evidence which completed the case.

The appellants were denied a fee upon the ground that under rule 12 they had forfeited their rights by neglecting the case for more than one year, and while in neglect had been superseded in the attorneyship.

Action affirmed.

LINE OF DUTY—RETIRED OFFICER—ORIGIN.

CATHERINE MEADE (WIDOW).

A soldier, retired after thirty years' service, can not be considered as still in the service for pensionable purposes without due proof of the origin of disability in line of duty. The service contemplated by the law is active service, and disability or death must be shown to be due thereto.

Soldier having had syphilis in service and there being intervals between his enlistments, as well as four years of separation from active service after his retirement, can not be presumed to have contracted disease of urinary organs, which led to his death, in service and line of duty simply because his active service extended over thirty years. Definite proof of origin and continuance is necessary.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 27, 1900.

Catherine Meade, widow of William Meade, late of Company F, One hundred and fifty-eighth New York Infantry, Battery K, Third United States Artillery, and Hospital Corps, United States Army, filed her application for pension July 23, 1897, alleging that her husband, who had served thirty years in the Army and was on the retired list, died at Garfield Memorial Hospital, Washington, D. C., June 18, 1897, and that his fatal disease was the result of his army service.

The claim was rejected May 14, 1900, on the ground that there is neither record nor other evidence connecting the cause of soldier's death, viz, rupture of the urethra, due to retention of urine, and septicæmia, while on the retired list, with his active service, and claimant declares her inability to furnish the required proof. This action was

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taken in response to a statement from the claimant declaring her inability to furnish the evidence of origin called for, and requesting that if the claim could not be admitted without such evidence it should be rejected at once, in order to give her the chance of securing a pension by special act of Congress. Nevertheless, when it was so rejected an appeal was filed, June 4, 1900, assigning said action as error and contending, first, that although retired soldier was still in the service and subject to the control and direction of the War Department, and therefore his death was in the service, and, second, that even if he should be held to be out of the service his disability should naturally be presumed the result of his long service, occurring as it did soon after his retirement.

Neither of these contentions can be considered of much weight. As to the first, it may be stated that while it is true a retired officer or soldier is in a sense still in the service in so far as he must comply with certain army regulations and obey orders from the War Department relative to certain specified matters, yet the service in which disability must be contracted or death must occur to give title to pension has been uniformly regarded as active service, military operations under the immediate supervision and command of officers in the field or at a post or station. As a rule, and for the most part, a retired soldier, as this one was, is relieved of all active duty and from the command of his officers and is free to control his own actions, being much the same as when on furlough, if not actually in the enjoyment of all privileges of a civilian and not connected with the Army. So that in this situation this soldier's death can not be said to have occurred in the service.

Regarding the second contention, it is enough to say that while soldier's service covered a period of thirty years, extending from August 18, 1862, to May 24, 1893, yet there were intervals between some of his discharges and reenlistments, and there was a space of four years after his active service ceased until his death, and during these periods, especially the latter, it was altogether possible that the fatal disease originated, in which case it could not be attributed to his service in line of duty. Then there is another fact disclosed by the record which is repugnant to the presumption urged in the appeal, namely, that during his service in Company K, Third United States Artillery, in 1880, soldier was treated for primary syphilis, a disease which might have been a forerunner and intimately connected with the cause of the fatal disability.

It is in evidence that the soldier was a bachelor up to January, 1894. This claimant has declared that she knew nothing of his condition before her marriage to him at said date, and there is no evidence showing whether the causes leading to the fatal disease were then developed or were observable. Indeed, there is no history of the disease at any

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stage or in any phase of it previous to the acute attack which led to his death. It is stated that an operation was advised, and soldier went to the hospital for that purpose. The record merely shows that "Patient entered hospital June 1, 1897; treated for rupture of urethra, and died from septicæmia, followed by (exhaustion) asthenia."

Another statement from the surgeon in charge is, "Rupture of urethra due to retention of urine."

As stated, there is no evidence showing the origin, duration, or extent of the primal disability. The soldier was over 60 years of age at the time of death. How far his age or the previous attack of syphilis or any other cause not incident to the military service may have been instrumental in producing the disease which resulted in death it is impossible to determine. It is very certain that it can not be taken for granted that said disease originated in the service and line of duty in the absence of any definite proof to that effect. The presumption contended for can not, therefore, obtain, and the soldier's death can not be regarded as due to his military service.

The rejection of the claim was proper and is affirmed.

LINE OF DUTY—LEAVE OF ABSENCE.

WILLIAM SMITH.

This appellant was granted leave of absence by his commanding officer to visit his family, with orders to return and report to his command on a certain day, and at a designated place. In obedience to said orders he returned and reported at the place, and on the day designated therein, but found that his command had moved on and was not at said place, which was occupied by the enemy, who attacked and wounded him.

Held, That the appellant was in the line of duty when wounded under the foregoing circumstances.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 27, 1900.

William Smith, late corporal, Company F, First Florida Volunteer Cavalry, filed in the Pension Bureau on August 17, 1877, an application for pension under the provisions of the general pension law based on gunshot wounds of right arm, right shoulder, left side, and left hand, alleged to have been incurred in line of duty during his military service on May 19, 1865, in action with the enemy.

Said application for pension was rejected on October 8, 1896, upon the ground that the claimant was not in line of duty at the time he incurred said alleged wounds, being then on leave of absence from his command to visit his family.

From said action appeal was taken on July 22, 1898.

There does not appear to be any question or controversy about the facts of this case. The official record of the appellant's military serv-

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ice shows that he served in the above-named organization from May 20, 1864, to November 17, 1865. The rolls of his company show him absent, wounded, in hospital at Montgomery, Ala., from May 24, 1865, to June 1, 1865. He has a hospital record of treatment for gunshot wounds in St. Mary's Hospital, Montgomery, Ala., from May 24 to June 1, 1865.

The circumstances under which the appellant incurred his alleged gunshot wounds are minutely and clearly described and set forth in the testimony of his commanding officer at the time, Lieut. Joseph Carroll of the same regiment, and by reputable and credible witnesses, members of the same company and regiment, who were with him at the time and saw said alleged gunshot wounds inflicted.

Lieutenant Carroll states that on May 11, 1865, he was placed in command of a detail of 25 men from said regiment, of which this appellant was a member, under orders to escort the United States mail from Montgomery to Eufaula, Ala. That having performed said duty he remained a few days at Eufaula to rest his horses before returning, and while at that place he granted the appellant and four or five others whose homes were in that vicinity, and whom he names, leave of absence for three or four days to visit their families, with orders to rejoin him on May 19, 1865, at Hobdy's bridge over Pea River, in Barbour County, Ala., a point on the route from Eufaula to Montgomery. That having heard that there were several parties of armed guerrillas operating in that part of the country, he hastened his departure from Eufaula, and returned to Montgomery by more rapid marches than he had expected, and consequently the detachment arrived at Hobdy's bridge a day or two sooner than the date upon which the men had been ordered to rejoin it at that place, and did not halt there, but passed over said bridge and continued on to Montgomery. That the appellant and the other members of said detachment who had been granted leave of absence came to Hobdy's bridge on May 19, 1865, to rejoin their command in obedience to his orders, and finding that the detachment was not there but had passed on, started to follow it; and on attempting to cross said bridge were fired upon by a band of rebel guerrillas, one of the party being killed, and all the rest, including this appellant, were wounded, with one exception. That as soon as the appellant and the other wounded men were able to travel, they rejoined their command at Montgomery, Ala. Daniel V. Melvin and Nathan V. Mims, two of the members of said detachment, and named by Lieutenant Carroll as two of the squad of men to whom he had granted leave of absence with the appellant under orders to report and rejoin him at said time and place, corroborate in every particular the foregoing testimony of the lieutenant, and state that they were eyewitnesses to the wounding of the appellant as above described, and were themselves wounded at the same time and under

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the same circumstances. Other members of said detachment and said regiment testify to the appellant's being detailed to go with Lieutenant Carroll on said expedition; that they saw him depart from Montgomery with said detachment, and a few days thereafter they saw him when he returned wounded, and understood at the time that he had incurred said wounds at the time, place, and under the circumstances above set forth. As a matter of fact, there is no dispute or controversy whatever about any of the material and essential facts of this case, and they appear to have been admitted and accepted by the Pension Bureau in the consideration and adjudication of this claim.

It is therefore difficult to conceive upon what basis it could have been held that this appellant's wounds were not incurred in line of duty.

In a communication addressed by the then Commissioner of Pensions to the attorney of appellant on July 25, 1896, after reciting the facts of the case substantially as herein set forth, the following language was used:

> Thus, while the soldier reported on time at the place where his officer told him to report, yet a leave of absence, written or verbal, is not terminated until the soldier actually reports to his command and becomes subject to duty, and he is absent on leave until he so reports to his officer. As the leave of absence in this case was verbally given to soldier to see his family, he was not in line of duty when he was wounded, and therefore the claim must stand rejected.

This ruling was evidently based upon an erroneous application of decisions of this Department in cases where it was shown that the soldier had been granted a furlough or leave of absence for a definite time and had started to return to his command prior to the expiration of his leave, so as to be able to reach the place where he was ordered to report prior to or upon the date when his leave expired, and was injured or disabled while en route and before actually reporting to his commanding officer in obedience to his orders. In such cases it has been held, with some force and show of reason, that the soldier was still on leave of absence and not in line of duty when injured, for the reason that his leave of absence had not terminated, and would not expire until he had actually reported for duty to his command upon the date designated in his orders.

There is no parallel, however, between the facts in such a case and those of the one at present under consideration, and the rule relative to line of duty announced in said decisions is wholly inapplicable to the case of this appellant. In this case, according to the testimony, the appellant and his companions did return and present themselves for the purpose of reporting to their command at the identical place and upon the very day that they had been ordered so to do by their commanding officer. There was absolutely no dereliction of duty whatever on their part, and they appear to have acted in strict obedience to their orders. The fact that when they arrived at the place

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where they had been ordered to rejoin their command, and on the day designated, they found that owing to the military exigencies of the occasion their command had unexpectedly passed on some time before and was not there, as they had been instructed it would be, was a circumstance for which they were in no way responsible and over which they had no control. They were acting under orders, and if they had gone to any other place or at any other time than that designated in their orders, and had been injured in so doing, they would undoubtedly have been acting in disobedience of orders, would not have been in line of duty, and disability incurred under such circumstances would not have been pensionable. Having arrived at the place at which they had been ordered to rejoin their command and upon the day when they were ordered to report, and finding that it had passed on, their plain and unquestionable line of military duty was to follow their command and rejoin it with all the expedition possible, and when in pursuance of this duty they were attacked by the enemy they were just as much in line of duty as though said attack had been made upon the detachment to which they belonged as a body, and under the immediate command and eye of their commanding officer, and the wounds and injuries thus received by them had been incurred under such circumstances.

It seems to me to be indisputable that when this appellant arrived at Hobdy's Bridge on May 19, 1865, in obedience to his orders, he was, from that moment, in line of duty, and when he was wounded in attempting to follow and rejoin his command in pursuance of his duty as a soldier he incurred said wounds in line of duty just as much as if they had been received in a general engagement in line of battle with his regiment.

To hold otherwise would not only be unjust and inequitable, but contrary to the dictates of sound reason and common sense as well.

The question of line of duty in this case is somewhat similar in principle to that arising in cases where the soldier, without fault or wrongdoing on his part, has been captured by the enemy while absent from his command on furlough or leave of absence. In such cases it has been repeatedly held by this Department that the capture of the soldier, under such circumstances, had the effect of restoring him to the line of duty, and that he was in line of duty during the time he was held as a prisoner by the enemy, and disability contracted during such period was pensionable.

The correct rule for determining the question of line of duty in cases like the present one was, in my judgment, laid down by the Department in the case of Ellen Anderson, widow (6 P. D., 197), which was one of the class of cases just referred to, as follows:

> Soldiers are not pensionable for disability incurred while on furlough or leave * * * because they are engaged in attending to their own private affairs during

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the continuance of such furlough, and for the time being they are not, in fact, actually serving the Government, although legally in the service. When they are no longer attending to or engaged in private affairs as distinguished from their military duties the reason which underlies the rejection of such claims disappears.

In this case the furlough was terminated, the soldier ceased attending to private affairs by a contingency of the war in which he had taken service, and from that moment he was in fact restored to and was in active actual service by virtue of his capture and imprisonment by the enemy, and must be considered to have been in the line of duty.

In his celebrated opinion on line of duty (7 Opinions, 149, 2 P. D., 403), Attorney-General Caleb Cushing used the following language:

When it is remembered that no commissioned officer or enlisted soldier, seaman, or marine, has power to cast off his obligation at will, that whether he be on duty or off, in glory as in disgrace, still the banner of his country is over him and its oath upon his conscience; when this great fact shall be remembered it must be inevitable to concede that any rule, based on the assumption of its being impossible for an officer or soldier on furlough, on leave of absence, in arrest, under sentence, to perform acts, suffer casualties, receive wounds, or incur causes of disease in the line of duty, is not a truth and, like all things not true, can not be conformable to justice or wisdom. As while on active duty he may do or suffer things not in the line of his duty, so while off duty, or on furlough, or under censure, he may do and suffer things which are in the line of duty.

The letter of the law prescribes that the quality of the act or condition as whether in the line of duty or not in it, shall determine the question of pension, that alone is just and wise; and that is the thought which, according to my reading of the statutes, has, from the beginning of this course of legislation to the end, held its place with unchangeable constancy in all the acts of Congress.

Viewed in the light of the foregoing principles it can not admit of doubt that this appellant was in the line of duty when he was wounded as alleged, and that the rejection of his claim for pension on account thereof was error.

Therefore said action of rejection is hereby set aside and reversed, and you are requested to reopen and readjudicate this claim upon its merits in accordance with the views herein expressed.

RANK—RATE—ACT JUNE 27, 1890—CONSTRUCTION.

MARY H. ELLIOTT (MOTHER).

Claimant's son having held the rank of major at the time he was killed in battle, November 27, 1868, she was entitled to a pension of $25 per month under her dependent mother's application filed January 16, 1891, and there was and is no authority of law for rating her pension at $12 per month under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 10, 1900.

Mary H. Elliott, mother of Joel H. Elliott, deceased, late major, Seventh United States Cavalry, appealed, May 28, 1900, from the

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Bureau action of April 26, 1900, allowing her dependent mother's reissue claim (certificate No. 338083) to correct rate, filed March 10, 1900, and dating the commencement of her increased rate from March 10, 1900.

Claimant contends that she is entitled under the law to pension in accordance with her son's rank from the date of filing her original application.

Soldier was killed in action at Washita, Ind. T., November 27, 1868.

Claimant filed her original dependent mother's application under section 4707, Revised Statutes, as amended by section 1 of the act of June 27, 1890, on January 16, 1891, which claim was allowed by Bureau action of July 1, 1892, and she was pensioned at the rate of $12 per month from January 16, 1891, the rate to which she would have been entitled had her son not been a commissioned officer.

As the evidence on file at the date of said adjudication, July 1, 1892, showed that claimant's son held the rank of major at the date of his death in service and in line of duty, she was entitled to a pension of $25 per month under her dependent mother's application filed January, 1891, and there was, and is, no authority of law for rating her pension at $12 per month.

The law fixes the rate (see secs. 4695 and 4707, Rev. Stat.), and where the facts are established, as in this case, showing that the claimant is the person entitled to rank rate, the duty of inserting the rate in her pension certificate is purely a ministerial act. (See Merrill on Mandamus, pars. 30 and 31.)

As held in the case of Elizabeth Darling (10 P. D., 299)—

> Mandamus would unquestionably lie against a Commissioner or Secretary of the Interior who refused to recognize rank rate, as the determination of that question alone is fixed by the law, and no discretion is left to the administrative officer when the undisputed facts establish the right to pension, the only remaining duty being the insertion of the legal rate. In such a case the duty of inserting the rate is ministerial, not discretionary or judicial, and a refusal to perform a plain ministerial duty could undoubtedly be enforced by the courts. The law fixes the rate.

When a statute imposes a ministerial duty upon an executive officer of the Government and he refuses to perform that duty, mandamus lies to compel performance, even though the officer is charged with a quasi judicial duty, involving the exercise of his discretion and judgment, in ascertaining and determining the facts upon which the ministerial duty depends. When the facts are ascertained and determined which alone allow discretion, mandamus will issue to compel the ministerial duty (Kendall *v.* U. S., 12 Peters, 524).

As stated by Baldwin, J., in the case of Decatur *v.* Spaulding (14 Peters, 606), in speaking of the duties of the Secretary of the Navy—

> As commissioner of the navy pension fund he decides whether the applicant comes within the law, on the evidence adduced before him; but when he has decided

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that a pension is due, or when the law declares that a person named is entitled to one, and prescribes the amount, he has no longer a discretion to withhold it. The ascertainment of the date at which pension commenced, its amount and duration, are ministerial acts on which discretion is excluded, for its exercise can not alter either. * * * Thus under the general act it is enacted: "That if any officer," etc., "have died," etc., "leaving a widow, such widow shall be entitled to receive," etc., or resolved "that the widow of the late S. D. be paid from the navy pension fund," etc. The command of the law is unqualified in both cases. If the applicant comes within the description, the officer whose duty it is to pay or direct the payment has no discretion to do or not after being satisfied of the right of the applicant as one of the beneficiaries of the law.

As was clearly demonstrated in the Elizabeth Darling decision (10 P. D., 299), the last proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," had no application or reference to dependent parents' claims filed under section 4707, Revised Statutes, as amended by the first section of said act of June 27, 1890, but that said proviso applied only to those beneficiaries designated in sections 2 and 3 of said act, whose rate of pension as well as title was first brought into existence by that act.

As was stated in said Darling decision (10 P. D., 299)—

The language used in said proviso to section 2 of the act of June 27, 1890, applies only by its plain terms to applications "filed under this act," and has no reference, by implication even, to applications that are filed under an act that was amended merely as to a matter of proof by the first section of said act of June 27, 1890.

The right of a dependent mother to "the same pension as such officer or other person would have been entitled to had he been totally disabled" has existed since July 14, 1862. (See Digest of Pension Laws, 1885, p. 496, sec. 3; 12 Stat. L., 566, 567.)

The first section of that act provides the rate for officers, noncommissioned officers, musicians, and privates, for a total disability.

Said section 3 of the act of July 14, 1862, then provided:

"That when any officer or other person named in the first section of this act shall have died, * * * or shall hereafter die, by reason of wounds received or disease contracted while in the service * * * and in line of duty, and has not left, or shall not leave, a widow or legitimate child, but has left or shall leave a mother who was dependent upon him for support in whole or in part, the mother shall be entitled to receive the same pension as such officer or other person would have been entitled to had he been totally disabled."

This grant to the dependent mother is now embodied in section 4707, Revised Statutes, and Congress, instead of showing any disposition to reduce the rate of the mother's pension, increased the rate of those dependent mothers whose sons were not commissioned officers from $8 to $12 per month by the act of March 19, 1886, thus amending section 4707 as affecting the dependent mother's rate.

It is to be borne in mind that said act of March 19, 1886, only applied to those who were entitled to receive a less rate than $12 per month, and in no manner affected those dependent relatives who were entitled to receive a rank rate of pension, or a rate in excess of $12 per month.

If it is contended that the dependent parents' rate is fixed by the act of June 27, 1890, then the rate of the dependent parent should be $8, not $12 per month; as $8 per month would be the only rate for dependent pensioners in the act of June 27,

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1890. Why, then, are dependent parents' claims adjudicated at $12 per month, $4 per month more than the dependent widow receives under the act of June 27, 1890?

If it be said that the dependent mother's rate is fixed by the act of March 19, 1886, as heretofore stated, a mere reference to that act shows that it only referred to and included within its provisions those "widows, minor children, and dependent relatives * * * entitled to receive a less rate than * * * $12 per month."

As the widow or dependent mother was at that date entitled to receive the rank rate of their husband or son, and as the lowest rank rate was more than $12 per month, the widow or dependent mother entitled to a rank rate were not the beneficiaries named in the act of March 19, 1886, and were not affected thereby.

If, then, the rate of a dependent mother whose son was a commissioned officer was not fixed at $12 per month by the act of March 19, 1886, where is the authority in any law to grant her a pension of $12 per month, and what law fixes her rate? Clearly the act of July 14, 1862, sections 1 and 3, paragraph 12, Statutes at Large, pages 566, 567, and now embraced in sections 4695 and 4707, Revised Statutes.

To hold that the proviso to section 2 of the act of June 27, 1890, that "rank in the service shall not be considered in applications filed under this act," repeals, by implication, the provisions as to rate of dependent parents' pension as prescribed by sections 4695 and 4707, Revised Statutes, is not only to violate all rules of construction of statutes, but would force us to the admission that it also repealed the provision of the act of March 19, 1886, which was, in effect, but an amendment of said section 4707, so far as it affected the rate of those dependent mothers entitled to less than $12 per month.

If, then, section 4707 and its amendment of March 19, 1896, are repealed by implication by the proviso of section 2 of the act of June 27, 1890, where is there left any rate for a dependent mother?

The act of June 27, 1890, fixed no rate for pension for a dependent parent, and did not attempt or purport to do so, but the rate of pension for dependent parents was left as it has existed under section 4707 as amended by act of March 19, 1886, and which said amendment of March 19, 1886, left the rank rate of the dependent parents of commissioned officers as prescribed and fixed by sections 4695 and 4707, Revised Statutes, unimpaired.

Believing as I do that claimant could enforce the payment of rank pension; that there never was any authority of law for limiting claimant's rate to $12 per month, and that gross injustice was done her by such allowance, the Bureau actions of July 1, 1892, and April 26, 1900, are reversed, and the Bureau directed to rate her $25 per month from January 16, 1891, and reissue a certificate therefor, deducting payments heretofore made.

As claimant is shown to be very aged, physically helpless, and in needy circumstances, her case has been made special, and prompt action in the readjudication of her claim is suggested.

The papers in the case are herewith returned.

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DISABILITY—ACT JUNE 27, 1890.

ARCHE C. WINFREY.

The fact that the claimant was not disabled in a pensionable degree from the causes alleged is not a good ground for rejecting his claim under the second section of the act of June 27, 1890, if it appear that he was so disabled from other causes not alleged.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 14, 1900.

Arche C. Winfrey, formerly a soldier in Company K, Fourth Provisional Enrolled Missouri Militia, filed applications for pension under the act of June 27, 1890, on October 29, 1892, and January 16, 1894, alleging inability to earn a support by manual labor by reason of disease of the heart and kidneys. Said applications were rejected in July, 1893, and April, 1895, respectively, on the ground that a pensionable disability was not shown. He filed another application on July 5, 1895, alleging the same causes of disability, and died on July 17, 1896, while the same was still pending. The last application was rejected in April, 1898, on the ground that he was "not ratably disabled under the act of June 27, 1890, from alleged disabilities." From that action an appeal was taken by the attorneys representing his widow, on July 27, 1898, their contention being that the rejection was contrary to the evidence.

The attorneys state that the claim was rejected on the ground that the soldier was "not disabled for manual labor." This is not strictly correct. The ground of rejection, as before stated, was that he was not ratably disabled from the causes alleged.

The soldier was not medically examined under his application filed July 5, 1895. An order for examination was sent to him on February 25, 1896, but on March 12, 1896, he filed a physician's affidavit stating that he was bedfast, suffering from dropsy, enlarged spleen, and inflammation of the stomach, and was unable to go before the examining board without great danger to his life. Testimony was filed in support of the claim as follows:

William H. Spurgeon testified, in an affidavit filed February 10, 1896, that he had known the soldier during the past two years and had known him to be bedfast several times with swelling of feet and legs, and that at the time affiant was testifying (February 1, 1896) he was totally unable to work.

J. Shirley, testifying on the same day, stated that he had known the soldier for the last ten months and that for the last four months he had been unable to work.

Dr. D. N. Clark testified, in an affidavit filed in February, 1897, that he treated the soldier professionally in 1893, and that he then had

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enlargement of the spleen and dropsy and was physically a wreck from a long-continued complication of diseases, and unable to perform any kind of manual labor. Affiant also attended him at the time of his death, the immediate cause of which was dropsy and a complication of liver trouble.

John Whiteley and George W. Finley testified, in an affidavit filed March 26, 1897, that the diseases which caused the soldier's death had, to their knowledge, been growing on him for ten years; that during the last three or four years he was scarcely able to do any manual labor whatever; his physical condition was very bad and he gradually went down until he became a total wreck.

The evidence, so far as it goes, tends to show that the soldier was, during the period between the date of filing his last application for pension and the date of his death, incapacitated for the performance of manual labor in such a degree as to render him unable to earn a support. It is not shown that his disability was due to the causes alleged by him—rheumatism and disease of the kidneys—but I am of the opinion that that does not constitute a sufficient ground for rejecting his claim.

Pension claimants are not held to strict technical descriptions of their disability. (Albert G. Hurst, 14 P. D., o. s., 472; Robert Crawford, 1 P. D., 153.) It is not absolutely necessary that an application under the act of June 27, 1890, should state the particular cause or causes of the disability which renders the applicant unable to earn a support by manual labor. A declaration in the terms of the act is sufficient. (See Instructions to Commissioner of Pensions, 9 P. D., 93.) Such a declaration having been filed, the rest is a matter of proof.

Ordinarily, if a cause of disability is found by medical examination which was not alleged by the applicant, he is called upon to state, under oath, when, where, and under what circumstances it was incurred, and whether it was in any manner caused by vicious habits. Such statement is not essential to the validity of his application, but is a part of the "due proof" necessary to establish his title. Where the claimant is incapacitated for making such a statement, by reason of insanity or death, the facts may be established by the testimony of other persons. It is apparent, therefore, that the failure of the applicant to "allege" the actual causes, or all the causes, of his inability to earn a support by manual labor in any case is not fatal to his claim, and that the fact that he is not disabled in a pensionable degree from the causes alleged is not a good ground for rejecting his claim if it appear that he is so disabled from other causes not alleged.

For reasons above stated the ground on which this soldier's application was rejected is held to be untenable.

The action is reversed and the claim remanded for readjudication, the papers being herewith returned.

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MARRIAGE AND DIVORCE—LEGITIMACY—MINORS.

ALLEGED MINORS OF WILLIAM HARTLEY.

1. A minor child, to be pensionable, must be the child of a woman to whom the soldier, its father, was legally married, notwithstanding that soldier solemnly declared and recognized it to be his legitimate child.
2. It appearing that the deceased soldier had been lawfully married prior to his marriage to the mother of the above-named minor children, that said marriage was never dissolved by divorce, and that said first wife survived him and is at present in receipt of a pension as his widow, and that the mother of said minor children also survived the soldier and is now living, said minors have no title whatever to pension as minor children of the deceased soldier under the provisions of the pension laws. See case of alleged minors of Jonas W. Pulver (10 P. D., 227).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 3, 1900.

H. Clay Wilson filed in the Pension Bureau on July 11, 1896, an application for pension under the provisions of the third section of the act of June 27, 1890, as the legal guardian of and in behalf of Linnie B., John A. L., Mary A., Lizzie A., and Charles H. Hartley, minor children of William Hartley (deceased), late private, Company K, Fifty-third Pennsylvania Volunteer Infantry, alleging that said soldier had served for ninety days and more during the war of the rebellion in said organization, had been honorably discharged from said service, and had died on January 23, 1896, leaving said minor children under the age of 16 years at the date of his death. It was also alleged in said application that the soldier left a widow surviving him from whom he was never divorced; that he remarried to Mary F. Walker, mother of these children; and that the father was married under the name of William H. Hartley to Mary F. Walker, April 6, 1880, there being a legal barrier to such marriage, but such barrier not being known to said Mary F. Hartley.

Said application for minor's pension was rejected on September 9, 1897, upon the ground that said minor children had no title to pension under the provisions of the pension laws, it being admitted that the soldier, their father, had a lawful wife living and undivorced at the time he married their mother, who survived him and is now in receipt of pension as his widow, was never lawfully married to the mother of said minors, who are not the legitimate children of said soldier, and whose mother also survived the soldier and is now living.

From said action appeal was taken on August 2, 1898.

It is manifest on the face of appellant's application for pension, and from the allegations therein contained that these minors have no standing whatever and no title to pension under the provisions of the pension laws.

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There is no doubt or controversy concerning the material facts in this case. It is clearly shown by the testimony taken upon a special examination of the claim for pension of the former lawful wife and present widow of the soldier, and is admitted by this appellant and the mother of said minor children, that the soldier was first lawfully married in 1851 to one Mary A. Sculley, in the State of Pennsylvania, and lived with her as his wife in that State until 1869, when he deserted her. Said marriage was never dissolved by divorce, but the soldier married Mary F. Walker, the mother of these minors, in Illinois, in 1880, and lived with her as his wife until his death. Both his lawful wife, Mary A Hartley, and Mary F. Walker, his second wife, survive him, and Mary A. Hartley is now in receipt of a pension under the provisions of the third section of the act of June 27, 1890, as his widow. In an affidavit filed in this case Mary F. Walker, the second wife of the soldier and mother of these minor children, states under oath that she discovered about 1890 that the soldier had another lawful wife living, from whom he had never been divorced, and that she taxed him with the fact and, after some reluctance, he admitted to her that he had deceived and wronged her, but that she continued, notwithstanding, to live with him as his wife thereafter until his death in 1896. She admits that she was never lawfully married to the soldier, and is not his lawful widow, and has no title to pension as such, and makes and has made no claim for such pension.

There is on file a sworn statement which the evidence shows was made and executed by the soldier a few days prior to his death, in which he acknowledges and recognizes the above-named minor children as his own, and declares himself to be their father and that they are his offspring, the fruit of his union with Mary F. Walker, and it is earnestly contended in this appeal that this declaration by the soldier rendered said children legitimate under the laws of the State of Illinois, and consequently they should be entitled to pension as his minor children under 16 years of age at his death. It may be, as contended, that such a declaration and acknowledgment of said minors by the soldier is sufficient to render them legitimate to the extent that they could inherit property from the soldier and be recognized as his heirs at law in the State of Illinois, but this has no bearing whatever upon the matter now under consideration, and does not affect in any way whatever the question of the title of said minor children to pension under the provisions of the pension laws of the United States.

The provisions of section 4704, Revised Statutes, unquestionably contemplate that only the children of the soldier born in lawful wedlock, or acknowledged by him before or after lawful wedlock with their mother can be considered as legitimate and pensionable as the minor children of the soldier under the provisions of the pension laws. A legal and lawful marriage of the parents must be established to create

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a pensionable status for a person seeking pension as a minor child of a soldier under 16 years of age. In this case, however, the question is not, primarily, one of legitimacy, but of title, nor is it necessary to discuss that question to determine the right of these minors to a pension under the law.

Under the provisions both of the third section of the act of June 27, 1890, and section 4702 of the Revised Statutes, the minor children of a soldier succeed only to the pensionable rights of their mother, the widow of the soldier, and their pensionable title is derived solely from and through their mother; and under no provision of the pension laws does it arise until after the extinguishment of her prior right and title by death or remarriage. Even where the soldier dies leaving no widow surviving, the minor children take the pension solely by reason of the fact that there is no widow to take it, and it is the pension provided by law for the widow, and which would have been paid to her had she survived the soldier, that they receive. In no event do the pension laws provide a pension for the minor children of a soldier in their own right where the widow, their mother, survives; and where, under the provisions of section 4706, Revised Statutes, the widow's pension is taken from her and paid to the children by reason of her abandonment of them, or because she is shown to be an improper person to be intrusted with their care and custody, it is the widow's, not the children's pension which is temporarily withheld from her by reason of her misconduct, and paid to the children during the period of their pensionable minority, and then returned to her.

The question of the title of minor children of a soldier to pension under circumstances very similar to those presented by the facts in this case was very clearly and exhaustively discussed in a decision rendered by this Department on May 31, 1899, in the case of the alleged minor children of Jonas W. Pulver (10 P. D., 227), as follows:

Section 4702, as amended (being an act approved August 7, 1882), places title, on the death of the soldier, in the widow, section 4703 adding to amount allowed the widow $2 for each child under 16 years. If there is no widow (death or divorce before the death of the soldier would make such a condition), then the title is placed in the minors. But note well that under such circumstances title is in the minors for the sole reason that there is no widow; and further, that there must at some time have been a legal wife, in whom but for the happening of a certain event the title would be, and that it is this title the minors take. If the widow dies without payment of pension to her, or remarries, or (section 4703) is "deprived of her pension under the provisions of the pension law," then title is placed in the minors. It is thus seen that the foundation of the title, so far as a minor is concerned, is in the widow; that is, in the wife of the soldier, who is the mother of the children in question. The title does not shift to the children only upon the happening of certain events to the widow and mother. If there is no widow, if there has not been a legal wife, how shall there be any title in the children? The foundation of the children's title is in their mother, the widow, the minors' interest being but a part of the superstructure. Now, if the alleged widow, their mother, never had or could have a

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title, the foundation has gone and there is nothing on which to build a title for the children. A right can not be built upon a title that does not and could not exist.

The pension laws are silent upon legitimacy as affecting the title to a minor's pension, save as hereinbefore stated, which laws, it is seen, have no bearing upon the issue herein. A pension is a public grant, and can be allowed only to those individuals whom the statute clearly and expressly embraces. State laws as regards legitimacy are of no avail, unless the United States statutes plainly allow them to control, which they do not. A minor must claim, if at all, through the title which would have been but for the happening of certain events in the widowed mother. If this mother never had or never could have title, it is impossible to discern the rights to title in her children. I reiterate, that you can not successfully claim a right through a title that never could have existence.

The minors in this case are not legitimate under the common law, for the reason that their mother was not the legal wife of the soldier, and consequently never was his widow. The alleged widow not having, and it not being possible for her ever to have had a title to pension, her children, although the offspring of the soldier, can have no title; their title being dependent upon her title, and her title being nil, theirs must be the same.

The foregoing language is directly applicable to the facts of this case and correctly states the law relative to the pensionable status and rights of the minor children of the soldier under the provisions of the pension laws of the United States.

But even if there was no question in this case relative to the legality of the marriage of the parents of these minors and their legitimacy, an insuperable obstacle to the allowance of a pension to them arises from the fact that their mother survived the soldier and is still living, and all right and title to pension on account of the services and death of the soldier would be vested by the provisions of the pension laws solely in her, and, as has been hereinbefore stated, the minor children of the soldier would have no right to pension whatever until the extinguishment of her prior title thereto by her death or remarriage.

It is clear, therefore, that the rejection of this application for pension in behalf of said minor children of the deceased soldier upon the ground stated was without error, and said action is affirmed accordingly.

EVIDENCE—PRESUMPTION OF DEATH—MARRIAGE.

MARY COBURN (WIDOW).

The claimant married the soldier in 1883, in the State of Illinois. Her former husband had been absent for a period much greater than seven years. His absence was continuous and unexplained, and no intelligence of his existence has ever been received.

Held: The presumption is in favor of the validity of the second marriage.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 6, 1900.

William C. Coburn, formerly of Company F, Eighteenth Massachusetts Volunteer Infantry, died on February 10, 1892, being borne

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upon the pension roll at the time under the provisions of the general law at the rate of $8 per month by reason of a disability resulting from chronic diarrhea.

On March 17, 1892, Mary Coburn filed a declaration for widow's pension under the provisions of the act of June 27, 1890, which claim was adjudicated and rejected on January 9, 1896, on the ground of claimant's inability to show the death of her former husband, one Edgar Thomas. This action was affirmed by the Department upon appeal on June 6, 1896. The claim was subsequently reopened, and a special examination had for the purpose of taking additional testimony, which, having been done, the claim was again rejected on December 4, 1899, on the same ground as that upon which the same was originally denied.

Assigning said action as error, appeal was taken on December 29, 1899, resting upon the contention therein set forth as follows:

That the facts in the case, as regards the former husband, are as follows: My husband (the first one) disappeared in the year of 1859, there being no discord between us and we had lived very happily together, and I know that nothing but death would have kept him away from me. The only proof of his disappearance that can be had is the fact that he has never been seen or heard of since he left me, so far as I know. The special examiner in New York failed to find any person who ever saw or knew him.

I saw the testimony gathered by said examiner, and he had failed to discover any trace of the missing husband, neither had he found anyone who had ever seen or knew him. The husband was advertised for by my relatives, and every known means was used to discover him, or his whereabouts, without any success. I was very young at the time and unsophisticated, and the efforts to find the missing husband were taken up by my relatives, who are now all dead.

I was obliged to go out in the world and earn my own living, which I did up to the time I met and married William C. Coburn, in the year of 1882, which was twenty-three years after the disappearance of my first husband.

I have supplied the best possible testimony of friends and relatives who have known me for thirty odd years, and who knew me as a widow prior to my marriage with Mr. Coburn, and it is impossible to get any better testimony than has been filed in the case, and the special examination has not developed any new or additional testimony.

Under the law and rules of practice, the fact of disappearance and continued absence for the great length of time as mentioned, without any cause, and no knowledge of his whereabouts, and nothing ever heard from or of the man, is good presumptive proof of death, and there is as much proof of his death as there is of our marriage, and the one can be accepted under the law as readily and legally as the other.

That the claimant contends that the rejection of the case on the grounds as stated was an error, in view of the rulings in the following cases, to wit: Annie Dennis, widow of William C. Reno, claim No. 753052; Marie Sharpe, 8 P. D., 175; Caroline Sickles, 6 P. D., 164; Sarah Gorby, 4 P. D., 298. That she also cites attention to the references as to law of evidence as cited in the Annie Dennis (Reno) case, all of which is applicable to the case at bar, and in view of all the facts in the case, and absence of all proof to show that the said husband was living at date of her marriage to the soldier, and no conflicting claim of any other person, it should, under the practice of "presumptive death," be adhered to in this instance and the pension allowed.

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She therefore appeals from the decision of the honorable Commissioner in rejecting her claim, and requests that the case be reconsidered and allowed on the fact that there is not the slightest of proof that the said husband can be living, or that he was living at the date of her marriage to the soldier.

There is ample record evidence under the hand and seal of the clerk of the county court of Cook County, Ill., that the claimant was married to the soldier on July 1, 1883, in said State of Illinois.

Among other things the claimant testified before the special examiner in 1895 as follows:

I am the widow of William C. Coburn, who served as a sergeant in Company F, Eighteenth Massachusetts Infantry. I became acquainted with him in 1882, while living in Chicago, Ill. He served four years, and I think that it was all in the same company and regiment. I never heard him speak of having ever been in any other regiment. I never heard him speak of having served in the naval service of the United States.

My husband was a pensioner at the rate of $8 for chronic diarrhea. He drew the pension for one year before he died only.

I am an applicant for pension as his widow under the June 27, 1890, law. That is the only application I have ever made.

Ada Sweet was my first attorney. Oscar Barber, of Chicago, Ill., is my attorney now.

When were you married to William C. Coburn?

In July, 1882—the 1st of July, 1882. We were married in Chicago, Ill.

Was William C. Coburn ever married before his marriage to you?

Yes, sir. His former wife died in the year 1880, I think.

Had you been previously married?

Yes, sir.

What was your maiden name?

Mary Hooley.

What was your former husband's name?

Edgar Thomas.

Where were you married to Edgar Thomas, and when?

In New York City; in 1856.

By whom were you married?

The Pension Bureau says it was a common-law marriage. There was no ceremony—it was just a cohabitation. That is all it was.

Where were you born?

Manchester, England.

Where did you first become acquainted with Edgar Thomas?

In New York City; I knew him first in England.

When did you first commence to live with him as his wife? Was it in New York City or in England?

In Manchester, England.

Then you were not married to him or you did not first take up your cohabitation with him in 1856 in New York City?

Well, it was the same year.

Now, tell just when you first commenced to live with Edgar Thomas as his wife and all the places you lived with him as his wife before you came to America?

We commenced to live as man and wife in the spring of 1856, at Manchester, England. It was only a few weeks when we left there and went to Edinburgh and Abbyfeldie, Scotland, and remained altogether in those two places about five weeks, when we came to America and took up our residence in New York City.

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Had Thomas been married previously to his cohabiting with you?

No, sir; he was then 41 years old. I had known him about a year before we commenced to live together. I had not been previously married. I lacked about two months of being 14 years old.

Where did you take up your residence in New York when you first came to that city?

No. 100 Eleventh street. I was with my uncle. John Hooley was his name. He is dead. There is not one of his people alive. We lived there until my husband went away. I think we lived in Brooklyn a little while at No. 214 Smith street. I don't just remember whether we were living with my uncle or in Brooklyn at the time he went away. I have quite forgotten, but it seems to me that I was living with this same uncle when he went away and my uncle had moved to Brooklyn.

What was Edgar Thomas's occupation?

He was a bookkeeper where they refined petroleum. I think the name was Miller & Co. They were located in Brooklyn. That was the only place he worked as long as he was living with me.

What was his physical condition?

He was very much troubled with catarrh of the bronchial tubes. He was of very spare frame. He was sick a good many times, while I knew him, on account of his throat. He was not an invalid, but he was a man of very delicate organization, as we would call it.

While you were at your uncle's house did you and Thomas cohabit as man and wife?

Yes; we were known as such. I was known by the name of Mrs. Thomas. My uncle and family knew there had been no ceremony of marriage performed between myself and Thomas; there were no objections to it at all.

What was your early religious belief?

I was brought up a Catholic. Mr. Thomas was a freethinker, and so was my second husband, Mr. Coburn. No, none of my family were freethinkers; they were all Catholics.

Was Mr. Thomas a man of financial means?

No; he only had his salary.

Was he one who had expectancy from any inherited property, either in the old country or in this country?

No; not that I knew of.

Will you state under what condition he left you or you left him or that you separated from each other?

It was of an evening, after we had supper; he went out to either collect a bill or to pay a bill. The cause of his going out was of so little importance to me that I paid no attention to what it was—but it was something relating to a bill and connected with his business. That was the last I ever saw him. No; there had been no quarrel between us. We lived very happily together, and there had been no quarrel between either he or I or with anyone of my family. We were a very happy family indeed.

What means, if any, did you take to search for him?

We advertised in the papers and did everything we could think of. My uncle employed a detective. You see I had always lived with this uncle, as my father and mother were dead. My uncle came to America just before I did. Yes; I lived at my uncle's house in the old country with Mr. Thomas as his wife. They came to America, and Mr. Thomas and I then went to Scotland, and from there came right to New York and took up our residence with them as we had before that.

Can you tell what papers the disappearance of Mr. Thomas were advertised in?

No; I don't remember. I did not have anything to do with that, as my uncle took that into his own hands.

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What property did your husband, Mr. Coburn, leave at the time of his death?

Nothing at all. He was a workingman, and had no property, either real or personal, outside of his apparel and household goods.

You made your application for pension in March, 1892; what property did you own then or that you have owned since that time?

I never owned any and have never owned any. I have worked for my living ever since my husband died. I have never had any money invested in any way, and have none at this time. I am dependent entirely upon my own daily labor for my support.

Richard M. Cahill appeared as a witness before a special examiner in 1899. Among other things the witness said:

I arrived in New York from England in 1865. I knew the claimant, Mary Thomas. It was a matter of family knowledge that her husband, Edgar Thomas, disappeared while she lived in Brooklyn, before we came here, and was never heard from. From the time I came to America we never saw nor heard of Thomas, and we never had any doubt of the fact that he had disappeared and was never heard of after that.

Sarah A. Hinchcliff, in 1899, deposed before a special examiner as follows:

I am the first cousin of Mary Coburn. We came from England. I can not say whether I or she came here first. My mother was a Hooley. She married Martin Cahill. He is dead.

Claimant lived with us a while. She was considered a single woman. The first I knew of her living with any man was with Edgar Thomas, and it was always understood they were married. I never saw—do not know where they lived, but it was in Brooklyn, N. Y. It seems to me they lived with John Hooly for a time, but I will not be sure. All I know about Edgar Thomas is that he went out one night and he never came back; this was at least twenty years ago. I always understood that they lived together happily, and I never heard any reason assigned why he should leave her. I do not know whether she had any children by Thomas or not. I am fully satisfied that she never was married until she married Edgar Thomas. I never heard it said that he was heard of after he left home. She later went to Chicago, Ill., and, as far as I know, she never married again until she married a man named Coburn.

Michael J. Cahill testified that he knew of the claimant in Brooklyn, N. Y., as early as the year 1858, and that she was then known as Mrs. Thomas—as widow.

William A. Cahill testified by affidavit in March, 1896, that he had known the claimant and her family for upward of twenty-five years, and that when he first knew her in Brooklyn, N. Y., she was known as Mrs. Mary Thomas, the widow of Edgar Thomas.

Several witnesses have testified that they were acquainted with the claimant from the time she went to Chicago in 1880, and that she has always been regarded as a woman of good moral character.

If the man Edgar Thomas was not the husband of the claimant, then her relations with him could not in any way affect her pensionable status. Assuming, however, that they sustained the marital relation, it appears with moral and reasonable certainty that he disappeared without any cause disclosed by the record, and that no intelligence was

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ever had of his existence for more than seven years prior to the marriage of the claimant to the soldier in 1883.

The act of March 13, 1896, provides that in claims for pension, where the continued and unexplained absence of an enlisted man or officer from his home and family for a period of seven years has been shown, during which period no intelligence of his existence shall have been received, such facts shall be accepted as sufficient proof of death. By the literal terms of the act its provisions refer only to cases in which it becomes necessary to prove the death of an enlisted man or officer. Thomas, the person whose death is alleged in this case, does not appear to have been an enlisted man or officer. But the facts enumerated in the statute above mentioned are sufficient under the common law to raise the presumption of death in any case. The distinction between the statutory provision and the common-law rule scarcely amounts to a practical difference. The facts which under the common law would warrant a presumption of death are, under the above-mentioned statute, regarded as sufficient proof of the same.

The common-law doctrine relative to the presumption of death is applied in the case of Davie *v.* Briggs (97 U. S., 628), wherein it is held:

> The general rule undoubtedly is that a person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.

Under the provisions of the act of August 7, 1882, such marriages as are involved in this case—

> shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued.

The claimant in this case resided in the State of Illinois at the time of her second marriage and also at the time when her right to pension (if any) accrued. In the case of Schmisseur *v.* Beatrie (147 Ill., 210) the doctrine involved in this case is announced as follows:

> 1. A second marriage is void when either of the parties to it has a husband or wife by a former marriage who has never been divorced and is still living.
>
> 2. Where a marriage has once been solemnized according to the forms of law every presumption will be indulged in favor of its validity. This presumption is so strong that a former husband or wife will be presumed to be dead after an absence of less than seven years. The ordinary presumption in favor of the continuance of human life is made to give way to the presumption in favor of the innocence of a second marriage.

The absence of Thomas, the first husband, is fairly shown to have been continuous and unexplained for at least twice the period of seven years prior to the time when the claimant entered upon her second marital relation. No intelligence of his existence seems yet to have been received. In view of these facts and in the light of the princi-

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ples hereinbefore announced, I am led to the conclusion that the claimant may and should be regarded as the widow of the soldier.

Action reversed, with instructions that the same be readjudicated in accordance with this opinion.

Herewith are returned the papers in the case.

ATTORNEYS—FEE—ACCRUED PENSION ACT MARCH 2, 1895—PAYMENT.

JOHN C. HOBSON, DECEASED (CLAIMANT).

S. W. DAUGHERTY & CO. (ATTORNEYS).

An agent or attorney rendering services in proceedings under the act of March 2, 1895, in behalf of a person entitled under its provisions to the accrued pension on a certificate of pension of a deceased pensioner, must look to the person by whom he is employed for payment for his services. Case of George Aab (9 P. D., 377) is overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 8, 1900.

S. W. Daugherty & Co., of Columbus, Ind., entered an appeal, December 15, 1898, from the action of your Bureau denying them a fee for services rendered Mary A. Hobson in the matter of her application for payment to her of the accrued pension of her deceased husband, John C. Hobson, who served during the war of the rebellion in Company I, Fourth Indiana Volunteer Cavalry.

At the time of his death her husband was a pensioner (certificate No. 337213) at the rate of $17 per month. He died May 22, 1897. In behalf of Mrs. Hobson appellants filed a declaration for widow's pension under the general law, and also a declaration under the act of June 27, 1890. On evidence filed by them the widow's claim under the general law was allowed, and for their services in the prosecution of such claim they were certified a fee of $25.

The widow's application under the act of March 2, 1895 (28 Stat., 964), for payment to her of the accrued pension of her deceased husband was filed August 23, 1898. Said application contains a power of attorney from the widow in favor of appellants. On October 8, 1898, accrued pension certificate and order issued for payment to her of the accrued pension.

The ground assigned by your Bureau for denying a fee to the appellants for their services in the prosecution of the application for payment of accrued pension is that they performed no material service in the premises. Such ground is untenable, since they rendered all service necessary to secure payment of the accrued pension. The question arises whether your Bureau had anything whatever to do relative to the matter of compensation for services in prosecuting such appli-

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cation. In other words, whether such compensation is not a matter solely between the applicant for the accrued pension and her attorneys.

Unless by a law of Congress your Bureau is charged with some duty in such matter it has none to perform therein. Neither the act of March 2, 1895, *supra*, under which this application for the payment of accrued pension arises, nor any other law of Congress, unless it be sections 3 and 4 of the act of July 4, 1884 (23 Stat., 98), contains any provision relative to the compensation of an agent or attorney for services rendered in securing payment of such pension. The question whether those sections of the act of July 4, 1884, make provision for and control the allowance and payment of a fee in such case depends upon whether such application is "a claim for pension" within the meaning of said sections.

In the matter of the application for payment of the accrued pension of George Aab (9 P. D., 377), the Department held, in effect, that proceedings for securing such payment under the act of March 2, 1895, constituted a claim for pension within the meaning of sections 3 and 4 of the act of July 4, 1884.

In the later case, however, of Margaret E. Davis (10 P. D., 403), being an application by the deserted wife of a pensioner for payment to her, under the act of March 3, 1899 (30 Stat., 1379), of one-half of the pension accruing to her husband, the Department held, generally, that the words "claim for pension," as used in sections 3 and 4 of the act of July 4, 1884, refer to the assertion of a right to have a pension allowed to the claimant in his or her own right, under some law of Congress granting a pension, and, specifically, that—

> the amount and method of making payment of the compensation of agents or attorneys for services in prosecuting an application for the divided payment of a pension, under the act of March 3, 1899, are not controlled by sections 3 and 4 of the act of July 4, 1884, and are matters of agreement and adjustment between the parties, over which, in the absence of abuse or misconduct on the part of the agent or attorney justifying disbarment, the Commissioner of Pensions has no authority.

The case just cited and quoted from is similar to the one at bar in all essential particulars, and the decision in the former is therefore of controlling authority in the latter.

The act of March 2, 1895, like the act of March 3, 1899, does not make a grant of pension. In its application to such case as is here presented the former act relates exclusively to payment of the pension elsewhere granted and has nothing to do with the prosecution of the "claim for pension," which claim was adjudicated and allowed years ago and payment of the pension was being made from time to time to the pensioner thereunder.

An entirely different case would be presented under the act in question where a person "entitled to a pension" dies "having an application therefor pending" and the person entitled to payment of the

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accrued pension prosecutes the pending application to completion. In such case the person so entitled would stand in the place of the deceased applicant for pension and might do anything in the prosecution of the claim for pension which such applicant could have done, including, of course, the due employment of an agent or attorney therein, the amount and method of payment of whose fee would be controlled by said sections 3 and 4 of the act of July 4, 1884. Such case would involve the establishment of the claim for right to pension under the grant thereof and not merely the right to the pension money of a deceased pensioner which was left unpaid at his death, as in the case at bar. In the latter case the application for payment is not a "claim for pension" within the meaning of said sections 3 and 4 of the act of July 4, 1884, and the matter of compensation for services in the prosecution thereof is not within the jurisdiction of your Bureau, but is a matter for the independent action of the parties to the contract for such services. In the former case, on the other hand, for reasons indicated, the fee, if any, and the manner of its payment would be controlled by said sections 3 and 4 of the act of July 4, 1884.

The refusal of your Bureau to certify a fee in this case is affirmed, in accordance with the views herein expressed; and the said decision in the case of George Aab is overruled in so far as it conflicts with such views. Herewith are returned the papers in the case.

INCREASE—THIRD GRADE—EVIDENCE—DISABILITY.

CALVIN A. HUTCHINSON.

The objective conditions—due to rheumatism and disease of heart, and the sequelæ thereof—described in the certificate of the medical examination held August 2, 1899, in pursuance of the claim for increase filed January 28 1899, show—in the judgment of the Department—the existence at that time of a degree of disability fully equivalent to the loss of a hand or foot, for purposes of manual labor; and it is, therefore,

Held: That the allowance of the third-grade rate from the date of the certificate of the said medical examination was, and is, fully warranted.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 10, 1900.

The papers in the case of Calvin A. Hutchinson, late captain Company D, Fourth West Virginia Cavalry, which were recently transmitted to the Department for consideration in connection with an appeal—entered July 7, 1900, from the rejection by the Bureau of the appellant's claim for increase filed January 28, 1899—are remanded herewith for the readjudication and allowance of the said claim for increase, in accordance with the views hereinafter set forth.

The appellant, who is now pensioned at $20 per month (total of

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rank) for rheumatism and resulting disease of heart, alleged in his aforesaid claim for increase that he had become unable to, and, as a matter of fact, did not perform any kind of manual labor.

The claim was rejected June 16, 1900, on the ground that the existing rate in the case was fully commensurate with the degree of disability manifested at the most recent medical examination held in the case.

The following statement, upon which the claimant based his claim for increase, was made to the board of surgeons by which he was last examined:

Have general rheumatism; worse in ankle joints and the shoulders; worse in left side. Suffer constant pain and always lame. Joints of feet and ankles are stiff. Have serious trouble with heart; worse when I lie down. Can't sleep good. Had to give up my position as miller a year ago because of my disabilities. Am now unable to do any manual labor.

The following objective conditions, as described in the certificate of that examination, were found:

Pulse rate, 70, 88, 126; respiration, 22, 22, 36; temperature, 99; height, 5 feet 11 inches; actual weight, 160 pounds; age, 62 years.

Body is emaciated. Muscles are soft and flaccid. Skin is pale and relaxed. Tongue generally red and fissured.

Rheumatism. The muscles of the shoulders and arms, including wrists and hands, are all sore and tender. There is considerable soreness of muscles of both hip joints. The knee joints are very sensitive to the touch, but there is no swellling of these joints. There is soreness of the muscles of legs. Very tender to touch. The ankle joints and all of the joints of the feet are sore, tender on pressure, and stiff. Motion of left ankle destroyed. Motion of other joints of left foot, and of right ankle and foot, one half destroyed. The rheumatic trouble affects the left side of body much more than right. Measure of thighs, knees, and legs shows a difference in size of 1½ inches in left thigh, 1¼ inches at knee; calf, 1¼ inches; and at ankle ½ inch smaller than right. Motion of shoulders and elbows is impaired, ½ in left, ¼ in right. Applicant is very lame in walking; has a shuffling gait on account of stiffness of ankles. For rheumatism, eighteen-eighteenths.

Disease of heart. Apex beat is in fifth interspace and on mammary line. Evident to inspection and palpitation. Area of cardiac dullness is increased transversely, extending to mammary line. The rhythm is irregular, and force is increased. First sound is feeble; second is sharp and accenuated. No murmurs. No œdema or cyanosis. Great dyspnœa on exertion. There is dilatation with hypertrophy. For disease of heart, twelve-eighteenths.

There is no nervous prostration, except the weakness caused by disease of heart. This claimant is so disabled from above disabilities as to be incapacitated for the performance of mauual labor and is entitled to $30 a month. There are no evidences of vicious habts.

It is contended, in effect, in the pending appeal that inasmuch as the degree of disability due to said pensioned causes has materially increased since the soldier's name was originally placed upon the pension rolls—at the present rate in the case (total of rank)—he is, consequently, entitled to a higher rate of pension.

As the evidence upon which the case was made special has some

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bearing upon the question now under consideration, the same is herein set out in full, and is as follows:

We, the undersigned, citizens of Spencer, Owen County, Ind., beg leave to state that we are well acquainted with Calvin A. Hutchinson, late captain of Company D, Fourth West Virginia Cavalry, and have been for many years; and for some years he has been in such poor health, from rheumatism and other disabilities, as to be unable to perform manual labor; that he is now blind in one eye and is fast becoming blind in the other from the same cause—cataract; that he is in indigent circum stances and, being unable to work, has no income outside of his pension. He is now 63 years old and has never received an increase of pension since his first allowance. We therefore most respectfully ask that his case now before you, docket 63580, be made special and acted on as soon as possible.

Most respectfully,

GEORGE W. EDWARDS.
WILLIAM H. GALLOP.

In a letter now on file in the case the appellant makes the following statement relative to his military service:

I was born and raised in Shenandoah County, Va. When Fort Sumter was fired upon I was run out of the South for my Union sentiments. I enlisted in Company K, Eighteenth Ohio, April 23, 1861, three months' call for 75,000 men; was mustered out August 28, 1861, having served four months and five days as first sergeant.

On the 2d day of October, 1861, I enlisted in the Fifty-second Illinois, was transferred to the regimental band, and was mustered out by act of Congress July 17, 1862, at Corinth, Miss.; reenlisted in Fourth West Virginia Cavalry, and was commissioned as captain of Company D, and served as such until expiration of term of enlistment.

I have three honorable discharges.

The contention of this appellant that he is wholly incapacitated for the performance of manual labor appears to be fully sustained by the facts presented in the case; but it is also shown that factors other than those accepted as of service origin are partly responsible for the degree of disability shown to exist. It is shown that he is 62 years of age, and, according to the testimony of Messrs. E. Edwards and Gallop, as hereinbefore set forth, that he is blind in one eye and rapidly losing the sight of the other. It is believed, however, that even were the appellant a much younger man and had good eyesight that the condition of his heart alone would prevent his performing much, if any, effectual manual labor. It is shown that upon exercise his pulse rate is nearly double, and that the number of his respirations is more than double, that of normal; that the said viscus is both hypertrophied and dilated; that its rhythm is irregular, and force increased; that its first sound is feeble, and the second accentuated; that there is great dyspnœa on exertion, and that his whole economy is affected to such a degree by the weakness of his heart as to lead him to believe he is also suffering from "nervous prostration" (neurasthenia).

In addition to the disabling effects of the aforesaid heart lesion, it is shown that the appellant is disabled to a very considerable extent by chronic rheumatism. While it is true that some of the symptoms

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thereof described in the certificate of the recent medical examination made of the appellant, namely, pain, soreness, and impairment of motion in the various muscles, tendons, and joints, are principally subjective, it is, nevertheless, a well-known fact that pain and stiffness are among the most prominent and characteristic symptoms of chronic rheumatism. It is also shown—objectively—that motion in the appellant's left ankle is entirely lost; that motion in the other joints of his left foot and in his right ankle and foot is one-half destroyed; that there is considerable impairment of motion in both shoulder and both elbow joints; that the left side is much more affected than the right by rheumatism—there being a difference in the measurements of the two sides of from one-half inch to 1½ inches—and, finally, as a result of said disease, that the appellant "is very lame in walking, and has a shuffling gait on account of stiffness of ankles."

As hereinbefore indicated, this soldier was among the first to respond to his country's call at the commencement of the war of the rebellion; enlisted in three different organizations, from each of which he received an honorable discharge; arose from the ranks to the command of his company; rendered the Government three years of honorable service, and finally contracted a disease while in the service and line of duty from which he has suffered ever since, which disease is not only a source of inconvenience and inability to earn a support by manual labor as well, but also causes much pain and distress at times, and being through its sequelæ a constant menace to his life. Besides which, as also hereinbefore stated, he is getting old, is rapidly approaching total blindness, and has no other means of support than his pension. It is in such cases as this that the Department does not feel like drawing such hard and fast lines as would resolve what doubt may exist in the premises against the claimant.

While it is not believed that this appellant is wholly incapacitated for the performance of manual labor by reason of the degree of disability due to the aforesaid pensioned causes alone, it is, however, the judgment of the Department that the degree of disability manifested at the medical examination held August 2, 1899, in pursuance of the claim for increase filed January 28, 1899, was fully equivalent to the loss of a hand or foot for purposes of manual labor, and it is therefore held that the allowance of the third-grade rate from the date of the certificate of the said medical examination was and is fully warranted.

The action appealed from is hereby reversed and set aside, and inasmuch as the case has been made special it is desired that the action herein indicated shall be taken at as early a date as practicable.

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LINE OF DUTY—ON A PASS TO HUNT.

MINOR OF JAMES S. MARSTELLER.

The officer, father of this minor, having been killed by the accidental discharge of his gun while hunting by permission of the commanding officer of the post, not the consequence of any willful neglect or improper conduct on his part, his death is considered to have occurred in the line of duty, the commander of said post reporting that said officer at the time he was killed was considered on detached service. (See case of Margaret M. Hoffman, 9 P. D., 277.)

Assistant Secretary F. L. Campbell, to the Commissioner of Pensions August 11, 1900.

Mary Caroline Ord, as guardian of Elise Marsteller, minor child of James S. Marsteller, late first lieutenant Company B, Twenty-fourth United States Infantry, filed an application for pension under the general law April 10, 1899, alleging the death of the soldier October 7, 1884, in service and line of duty, from accidental gunshot wound, and the death of his widow January 25, 1892.

The claim was rejected July 18, 1900, on the ground that soldier's death did not occur in line of duty, and from this action appeal has been entered July 31, 1900, assigning the same as error, and citing the decision in the case of Margaret M. Hoffman (9 P. D., 227), in support of the contention that soldier's death was in line of duty.

These proceedings, as regards the basis of rejection and appeal, are a repetition of those had in the claim of the widow during her lifetime. She filed a claim February 17, 1885, shortly after the soldier's death. The rejection of that claim January 28, 1886, was affirmed upon appeal by a decision rendered November 28, 1888. Upon a motion for reconsideration, a like decision overruling such motion was rendered January 24, 1893. This last decision embodied (in quotation) the first, and likewise contained a full statement of all material evidence from the records bearing on the soldier's service, the manner of his death, the proceedings in connection therewith, and a report of the commanding officer as to the status of said soldier as it was regarded at the time of death. For the purposes of revision this last decision is here set out in full:

The COMMISSIONER OF PENSIONS.

SIR: Herewith are returned the papers which accompanied your report on November 15, 1892, upon the motion to reconsider the former decision of this Department, in which the action of your Bureau was affirmed.

Lieut. James Marsteller served in the Twenty-fourth United States Infantry, and was killed October 7, 1884, by the accidental discharge of his gun while hunting.

The claimant filed a declaration for pension as widow February 17, 1885, but the claim was rejected by direction of the then Commissioner, who held "that soldier was not in line of duty when fatal cause of death was incurred. The soldier was in

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the exercise of a privilege and not engaged in the performance of a duty incident to his service. He was hunting for his own amusement and hence at his own risk."

An appeal was taken October 6, 1888, and on November 28, 1888, the rejection was affirmed by a decision of this Department, which closes with the following:

"The only question involved in this case is, whether the soldier was killed in the line of duty.

"The facts found in the evidence are substantially as follows: That the soldier had permission from Maj. Charles C. Rawn, of the Twenty-fourth Infantry, commanding post of Fort Elliott, Tex., to hunt, and that while out hunting he was killed October 7, 1884, by an accidental discharge of his gun about 2 miles east of said fort.

"It is not alleged that the hunting in which the soldier was engaged at the time he was killed was necessary to provide for himself or his command. The purpose for which he was absent is not shown, but, on the other hand, it would appear that the hunting was for the soldier's own amusement and pleasure.

"In the case of William M. Ammerman (vol. 1, Pension Decisions, p. 5), it is held: 'The cause of disability or of death giving title to a pension must in some measure pertain to and have natural and logical connection with the military service and line of duty in said service.'

"In view of this decision it must be held that the soldier was not in the line of duty when killed.

"The case of Fred W. Smith, No. 143089, page 274, New Digest, and the various orders issued by the Adjutant-General's Office, cited by the appellant, are not applicable to the facts in this case.

"The action of your office in rejecting the claim is therefore affirmed."

The following was transmitted from the War Department, under date of March 23, 1885:

"James S. Marsteller accepted commission as second lieutenant, Twenty-fourth Infantry, February 10, 1875, and was promoted first lieutenant January 7, 1879.

"He is reported by Maj. Charles C. Rawn, Twenty-fourth Infantry, commanding post of Fort Elliott, Tex., to have been killed October 7, 1884, by an accidental discharge of his gun while out hunting about 2 miles east of Fort Elliott, Tex. Copy of letter inclosing copy of finding of coroner's jury herewith.

"The records of this office furnish no further information.

"C. W. KEEVER,
"*Assistant Adjutant-General.*"

FORT ELLIOTT, TEX., *October 8, 1884.*

To the ADJUTANT-GENERAL U. S. ARMY, *Washington, D. C.*

SIR: I have the honor to report that First Lieut. J. S. Marsteller, Twenty-fourth Infantry, was killed yesterday, the 7th instant, by an accidental discharge of his gun, while out hunting about 2 miles east of this post. He has this day been buried in the post cemetery. The rendering of this report has been delayed pending action and report of coroner's jury in the case, copy of which is inclosed herewith.

His widow takes possession of his effects.

Very respectfully, your obedient servant,

CHAS. C. RAWN,
Major, Twenty-fourth Infantry, Commandant of Post.

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MOBEETIE, *Oct. the 7 day, 1884.*

We the jury find that the deceased, Lieut. J. L. Marsteller, came to death on the 7 day of Oct., 1884, by an accidental discharge of his gun near Mr. Vanhorn's pasture east of the town of Mobeetie, Wheeler County, Texas.

C. M. BOYNTON.
HENRY HAMBURG.
J. J. JOYCE.
L. B. ANDERSON.
J. J. LONG.
J. R. RICHARDSON.
J. W. BREWER, J. P.

I, J. W. Brewer, hereby certify the above to be a correct copy of coroner's inquest held over the body of Lieut. J. L. Marsteller, in Fort Elliott, on the 7 day of Oct., 1884.

J. W. BREWER, J. P.,
Prect. No. 1, Wheeler Co., Texas.

R. C. Newton, assistant surgeon, in a letter dated March 4, 1885, stated:

I hereby certify that on the 7th of October, 1884, I went hunting with the late First Lieut. J. S. Marsteller, Twenty-fourth United States Infantry. That we had both previously obtained permission from the post commander, Maj. C. C. Rawn, Twenty-fourth United States Infantry. That no ardent spirits had to the best of my knowledge been drunk by either one of us on the day referred to. That Lieutenant Marsteller was not under the influence of liquor nor any drug whatever, and that his death was caused by an entirely unforeseen accident, for which neither of us were to blame, and that in my opinion Lieutenant Marsteller's death overtook him while on duty as prescribed by the regulations and orders governing the Army.

R. C. NEWTON,
Assistant Surgeon, United States Army.

Under date of June 9, 1885, the Assistant Adjutant-General transmitted the following letter:

FORT ELLIOTT, TEX., *May 31, 1885.*

Respectfully returned.

The custom at this post is to send out hunting parties to hunt for the command, as in every instance some part of the garrison, or all of it according to the success of the hunt, are benefited by a distribution of the game. All parties have been considered as on detached service. Lieutenant Marsteller at the time he was killed was considered on detached service, although there was none other than a verbal order from myself for said service.

CHAS. C. RAWN,
Major, Twenty-fourth Infantry, Commanding.

The rejection was affirmed on the ground as stated in said opinion "that it is not alleged that the hunting in which the soldier was engaged at the time he was killed was necessary to provide for himself or his command. The purpose for which he was absent is not shown, but, on the other hand, it would appear that the hunting was for the soldier's own amusement and pleasure."

The case has been carefully examined, and it appears to the Department that the officer at the time of his death must have been engaged in hunting on his own account, and for pleasure, as held in the former decision. He was an officer and not obliged to obey an order to perform such a duty, which is a strong circumstance indicating that he was not at the time in the line of duty. The motion is overruled and the former decision adhered to.

Very respectfully,

CYRUS BUSSEY,
Assistant Secretary.

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Since these decisions were rendered the question involved has been presented in a somewhat different light in other cases, notably that of Margaret M. Hoffman (9 P. D., 227), cited in the appeal. In that case the facts relating to the manner in which the soldier was engaged at the time of his death, the authority for being so engaged, and the immediate cause of death are very similar to those recited in reference to this officer. In that case the soldier was a principal musician. In this a first lieutenant. In both cases the permission to hunt appears to have been verbal only, from the superior officer. In both cases the manner of death was investigated and found to be accidental, without fault or improper conduct on the part of the deceased.

In these and some other respects there is much that is parallel in the two claims, and upon an application of the principles on which the Hoffman case was decided it would seem that this minor's claim should have been admitted. A different view was taken, however, and the rejection was in pursuance of instructions from the First Deputy Commissioner in the following paper:

MR. DALTON, *Chief, Board of Review:*

The soldier, accompanied by a fellow-officer, left the post of Fort Elliott, Tex., by permission to go out hunting, apparently for pleasure, in October, 1884, and was killed by the accidental discharge of the gun he had borrowed. This is from the record.

His fellow-officer and companion, Asst. Surg. R. C. Newton, certifies to the accidental killing; also that neither of them had drunk ardent spirits that day.

The question presented is: Was the soldier in line of duty when killed?

He left a widow and one minor. The former filed her claim for pension February 17, 1885, and it was rejected January 28, 1886, on the ground that the soldier was not in line of duty when killed.

On November 28, 1888, an appeal was taken to the honorable Secretary of the Interior from the action of the Pension Bureau. The Secretary sustained the Bureau by affirming the rejection.

On January 13, 1892, a reconsideration was asked by the attorney, Charles W. Tabler, and the Secretary on January 24, 1893, denied the motion by refusing to reconsider.

It will be seen by this that the action of rejection has been affirmed by two Secretaries under different Administrations.

The widow died January 25, 1899. On April 10, 1899, the minor, then 19 years of age, filed her claim through Taber & Whitman, of this city.

The conditions surrounding the present claim are the same as those existing at the time the widow's claim was rejected. The law relative to line of duty remains the same.

Personally the attorney informs me that the claim is based upon the decision in the claim of Margaret M. Hoffman, widow of Oskar Hoffman, band, Twenty-third United States Infantry, original, No. 625659. (Vol. 9, p. 227, P. D.)

I am unwilling to concede that the two claims are analogous, and even if they were that the decision in that controls the adjudication of this. The soldier, in the case before us, was a commissioned officer; a gun was not a part of his equipment, and it was not essential that he become efficient in its use, nor was it necessary to provide fresh meat for the commissary. He was simply out on a pleasure excursion,

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and assumed all the risks attendant thereon. He was no more in line of duty than if killed in a railroad accident en route to a picnic.

It has been held on numerous occasions by the Secretary that death while absent from camp on pass or by permit was not in line of duty. It is also held that a private wounded or killed by the accidental discharge of a pistol in his own hands was not in line of duty, for the reason that a pistol is not a part of the equipment of a private soldier. Shall it now be held that this one decision overrules all others, and reopens all claims, where conditions were in any manner similar, disposed of by rejection years ago? A claim rejected after all the facts are presented should remain rejected. Every claim, when line of duty is the issue, stands or falls by itself.

You may reject on the ground that the soldier was not in line of duty when killed.

J. L. DAVENPORT,
First Deputy Commissioner.

It is probably not a matter of much importance, but I fail to find in the record any statement that the gun used by this officer was borrowed. It was shown in the case of Hoffman that when he received permission to hunt he was furnished with a regulation shotgun for hunting purposes, and other equipments. As far as appears in the evidence it may have been the same with this officer. As for the statement that because this soldier was a commissioned officer a gun was not a part of his equipment, and it was not essential that he become efficient in its use, the same might be stated of a principal musician, as Hoffman was; and yet the official reports in the latter's case, and the decision, recognized his right to use a gun in hunting, just as any other soldier might do.

I am unwilling to subscribe to the declaration that efficiency in the use of a gun is not essential to a commissioned officer. He is generally supposed to be able to train or teach as well as command private soldiers, and should be himself well skilled in all of their duties, even to the handling and firing of a gun. Besides, it is not infrequently the case that an officer might use a gun in battle to good effect, and in emergencies might find proficiency in its use of saving benefit to himself and others. More than this, it was shown in the decision mentioned that the Army Regulations provide for hunting by officers, and require its encouragement among all classes of soldiers, partly to perfect them in the use of firearms and partly to supply game to the post or camp.

It is not understood, however, that this supplying of game is on the score of it being "necessary to provide fresh meat for the commissary," as the above instructions intimate, but rather for the purpose of giving variety in diet. Moreover, because a degree of pleasure and excitement attaches to this hunting of game is not believed to be a good reason for regarding the participant as less free to indulge in the pastime or more chargeable with individual and nonofficial responsibility. If, as indicated by the statement of Major Rawn, this officer was con-

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sidered as on detached duty, and the expectation was that the garrison would be benefited by the distribution of game in the event of the hunt being successful, it seems to me to be a very different situation from that of going to a picnic.

Line of duty being the point to be determined, this report of the commanding officer goes very far to settle the matter, because it is evident that in giving the permission to hunt he not only regarded the officers as continuing in the status of official duty, but could, under paragraph 58 of the Army Regulations, require an official report of their acts and movements. Furthermore, the situation of these officers, in their relation to the command and the manner of employment, was, as already intimated, not dissimilar to that of Principal Musician Hoffman, and the opinions of high army officers, including the Surgeon-General, the Judge-Advocate-General, the Adjutant-General, and the Secretary of War, in the latter's case would seem to be as strong in fixing the status of this officer as they were regarded in the former decision. The gist of the matter is that I am unable to see the marked difference between the two cases indicated by the instructions of the deputy commissioner.

It is hardly necessary to enter into further discussion to show the distinction between the manner in which this officer was engaged, although enhanced, as such occupation is supposed to be, by personal enjoyment, and that of one absent from all duty and official restraint, for purposes of private business or pleasure only, as when on a furlough or other ordinary leave of absence. In the one case the occupation is, as stated in the Hoffman decision, a quasi-military duty, performed not far from the camp or post, and usually within reach of a recall or other order from the superior officer. In the other there is a disconnection for the time being from company or command, and freedom from orders or obligations of a military nature.

The distinctions and definitions in the learned opinion of Attorney-General Cushing, quoted largely in the Hoffman decision, would seem sufficient to fix the standard by which these matters should be judged and to render easier the task of differentiating between one set of circumstances and another in determining the question of line of duty. It was stated in that opinion and reiterated in the decision that the particular facts in each case must govern in such determination. In a decision in the case of William R. Johnson (4 P. D., 167), the following language was used:

> Whether a soldier was acting under "military authority" is not the only test of his being within the line of duty; but the purpose for which the authority was given, as to being connected with his military duties or with his own private affairs, and also whether the authority was an order or a mere permit, and the character of military duty the command was performing at the time must be considered; although if that which he was only permitted to do was in line of good military discipline and calculated to promote the interests of the service, he would still be in line of duty.

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Upon the basis of these opinions and taking all the facts in connection with this officer's death into consideration I am forced to the conclusion that he was in the same relation with reference to his military duties as Principal Musician Hoffman and that this case must be decided as was the other, in favor of the claimant.

As for the statements of the deputy commissioner in the last paragraph of his instructions it need only be recalled that while it is true there have been many decisions that held that death during absence from camp on pass or by permit was not in line of duty, yet there have been many others which held just the reverse. Everything depended, as already urged, upon whether the cause of disability or death was at all an act of military duty. Without attempting to quote these decisions on either side it is believed sufficient, to sustain the conclusions in this case, to cite the following cases: Martha G. Burnham (5 P. D., o. s., 102); Zenas Hamilton (3 P. D., 3); Wesley C. Gerard (4 P. D., 51); Charles Wilcox (1 P. D., 11); Florence N. Conie (2 P. D., 58); Henry Newman (8 P. D., 532).

A careful reading of these decisions will show that in each case the acts of the soldiers had some sort of connection with their military duty, whereas in cases like those mentioned by the deputy commissioner no such condition existed. Some of the latter cases are Roslinda McCabe (5 L. B. P., 273); Robert Newman (6 P. D., o. s., 228); Benjamin F. Worrell (6 P. D., o. s., 309); Benjamin W. Seaman (9 P. D., o. s., 8); John Pruitt (9 P. D., o. s., 295); William H. Cummings (1 P. D., 351); John Gant (1 P. D., 118), et al.

Neither the decision in the Hoffman case nor this one is intended "to overrule all others and reopen all claims where conditions were in any manner similar disposed of by rejection years ago." But, if in such a case the facts show disability or death intimately connected with the military service and erroneous judgment has been rendered as to line of duty, there is no reason why it may not, in the interest of justice and a fair administration of the law, be reopened and the action overruled, no matter how many years the error had existed. I am free to recognize the propriety of allowing rejected claims to stand so when there is simply a matter of judgment upon undisputed facts involved and there has been no change in the law or its construction.

In this case, however, I believe the judgment was erroneous in the widow's claim, and since the facts place the case so nearly on a parallel with the Hoffman case I can not see how the said judgment can be consistently allowed to stand. The action in the minor's claim is accordingly reversed and the papers are returned for the purpose of having a readjudication upon the line herein suggested.

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DEATH CAUSE—COMBINED CAUSES.

MARY E. DOLAN (WIDOW).

MINOR OF HARLA DOLAN.

Soldier's death from quick consumption, following an attack of pneumonia, can not be accepted as due to chronic diarrhea of service origin, said diarrhea not being an important controlling factor in nor so complicated with said death cause that its influence can not be separated therefrom.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. August 18, 1900.

Mary E., as widow of Harla Dolan, formerly a private in Company A, Fifth Iowa Volunteer Infantry, filed her application (No. 354719) for pension under the general law on May 12, 1887, which claim was rejected on May 16, 1896, on the ground that soldier's death was not due to the service.

The same person, as guardian of Onie Agnes, minor child of above-named soldier, filed her application (No. 426389) under the same law on July 26, 1895, claim being rejected May 16, 1896, for same reasons as stated above. Appeals were filed in both cases on May 31, 1898, and the issue and facts being the same the cases will be consolidated.

It appears that soldier died on September 22, 1881. He contracted pneumonia (date not given). The same was followed by what is termed "galloping consumption," which last-mentioned disease caused death.

The attending physician, after swearing positively that soldier died of chronic diarrhea, admitted, after much endeavor on the part of the Commissioner of Pensions to get the exact truth from him, that soldier did not die by reason of chronic diarrhea, but that he died as stated in the preceding paragraph. Said physician does state that soldier's "powers of resistance were reduced to a minimum," by reason of which he concludes that chronic diarrhea was a "remote cause" of death.

Even if it were admitted (which it is not) that chronic diarrhea, for which soldier was pensioned at $4 per month, was a remote cause for death, it would be no reason for concluding that soldier died of disease contracted in the service. Cases of this character are often before the Department, and it is frequently argued that if a disability or disease accepted as of service origin is present at death, such disease or disability must be held accountable for the death. Such an argument, however, is fallacious and will not bear careful scrutiny.

The cause of death in a widow's claim under the general law must be traced directly to the service. One may be afflicted at death with a great number of disabilities, a larger portion of which may be due to the service, and yet may die of something totally unconnected with the service.

In the case under consideration, the soldier contracted pneumonia;

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and the first question is, Did the chronic diarrhea have anything whatever to do with the contracting of said disease? The answer is clearly in the negative. The pneumonia developed a case of quick consumption, and the question then arises, Did chronic diarrhea have anything to do with such development? The answer is again in the negative. It is difficult, then, to understand how chronic diarrhea was in any way a factor in the death of soldier. Under the evidence in the case it played no part, for the statement of the physician, quoted above, amounts to nothing but a belief, without any grounds shown for such a belief. As to the cause which produces a certain effect, the law looks to the proximate and not to the remote, casual, or incidental cause. It is sometimes difficult to draw a distinct line between a proximate and casual cause; but it may safely be said that the cause of death must have originated, primarily, in the service. In other words, and with more particularity, an unbroken connection must be shown between the disability originating in the service and the cause of death, such disability being the real and controlling factor which induces the fatal disease.

The cases of Mary A. Cox (3 P. D., 313) and Napoleon B. Trask (9 P. D., 113) are often quoted by attorneys and claimants in cases similar to the one under consideration, the Trask case being cited by the attorney herein. A careful examination of these two cases fails to disclose anything in conflict with the views herein expressed. It may also be said that both quoted cases are very frequently misinterpreted by claimants. The principles enunciated in both the Cox and Trask cases may be stated as follows, being easily summed up under two conclusions:

First. When it is shown that a disability of service origin was an important controlling factor in the cause of death, as well as being so complicated with other causes that its influence can not be separated from the other causes, or the precise degree of materialness of each factor in death is not susceptible of determination, then the disability of service origin may be legally accepted as the cause of death.

Second. When it is shown that a disability of service origin was a predisposing factor in the death cause, although so connected with other obscure causes that the particular or specific contribution of each disease in the actual cause of death is not determinable from a medical standpoint, then such disability may be accepted as the cause of death, provided the evidence shows that the service disability was so great a contributing factor that but for such service disability death would not have ensued.

Following the decisions in the Cox and Trask cases as herein construed, it is clear that soldier's death, in this case, was not due to the service.

The actions appealed from are affirmed.

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DISLOYALTY—SECTION 4716 OF THE REVISED STATUTES.

CHARLES F. M. GUERNSEY.

Claimant, while a prisoner of war at Andersonville, Ga., having enlisted in the Confederate service in February, 1865, is barred from pension by reason of the provisions of section 4716 of the Revised Statutes, notwithstanding his allegation (uncorroborated) that his enlistment was merely a subterfuge to enable him to escape to the Union lines, which he did in April, 1865, it being held that said enlistment and service was voluntary. (Milo B. Ousterhout, 7 P. D., 270.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 18, 1900.

This soldier was formerly pensioned under the act of July 14, 1862, at the rate of $4 per month, for chronic diarrhea, disease of the mouth resulting from scurvy, and injury of the back. In November, 1896, his name was dropped from the pension roll on the ground that he had voluntarily served in the Confederate army and payment of pension to him was therefore inhibited by section 4716 of the Revised Statutes. Your Bureau having declined to consider an application for restoration filed November 22, 1897, an appeal was filed on June 6, 1898, the contention of which is that the claimant's enlistment in the Confederate army, while a prisoner of war, was only a subterfuge to afford him an opportunity to return to the Union Army, which he did in a very short time, and that it should not be regarded as an act aiding and abetting the rebellion within the meaning of section 4716, Revised Statutes.

The records of the War Department show that the claimant enlisted as a private in Company E, Seventy-second Ohio Infantry, on the 10th day of November, 1861; reenlisted as a veteran December 23, 1863; was taken prisoner at Ripley, Miss., June 11, 1864; was transferred to Captain O'Neill, a rebel recruiting officer, while a prisoner of war at Andersonville, Ga., February 28, 1865; escaped from Savannah, Ga., April 3–9, 1865; was sent to Annapolis, Md., and from there to Camp Chase, where he reported on May 9, 1865, and was mustered out June 24, 1865.

The record, "Escaped from Savannah, Ga., April 3–9, 1865," probably means that he reached the Union lines at that place between April 3 and 9, 1865. He says he made his escape at Macon, Ga.

It is not denied that he enlisted in the Confederate army, or that he performed service therein between the date of his enlistment and the date of his escape.

In the case of Milo B. Ousterhout (7 P. D., 270) the Department, after careful consideration and an examination of all previous decisions on the subject, held:

1. That enlistments in the Confederate army will be presumed to have been voluntary until the contrary is satisfactorily shown.

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2. That such enlistment and service in the Confederate army is such a voluntary aiding and abetting the rebellion against the authority of the United States as, under section 4716, Revised Statutes, will bar title to pension.

3. That where such enlistment and service in the Confederate army is sought to be palliated or excused on the ground of duress, that the same was not voluntary, or that it was for the purpose of escape from imprisonment by the so-called Confederacy, the presumption of voluntarily aiding and abetting the rebellion can only be overcome by the most positive, direct, and satisfactory evidence, and the uncorroborated testimony of a claimant will not be accepted to overcome such presumption.

4. That the fact that a soldier of the United States Army was confined as a prisoner of war in a Confederate military prison is no excuse for enlisting or serving in the Confederate army.

These views are still adhered to by the Department. It is contended in the appeal that a different principle was enunciated in the cases of James H. Rainey (8 P. D., 77) and George L. Henry (Ib., 422), and that under the rule laid down in those cases this claimant is not within the prohibition of section 4716, Revised Statutes.

In the case of Rainey (in which the material facts and averments were very similar to those in the case now under consideration) the Department used the following language:

The claimant did not return to his company until April 18, 1865. At that time hostilities were practically over. It is not shown where he was, or how he was engaged, from the 28th day of February, 1865, when he was transferred to the rebel recruiting officer, until the 18th of April, 1865, when he returned to his company. The presumption from his act is that he intended to aid and abet the rebellion, and it will require very positive evidence to show to the contrary. His intentions may be inferred from statements made by him at the time and from his subsequent conduct up to the time he joined his company. If the claim is further prosecuted evidence on these points must be produced. As the case now stands, the action of your office rejecting the same is affirmed, on the ground of the insufficiency of the evidence to show that claimant contracted the disability alleged in the line of duty, and for the further reason that the evidence tends to show that he voluntarily aided and abetted the rebellion.

This decision was strictly in line with the decision in the case of Ousterhout. The case of George L. Henry presented a very different state of facts. Henry swore that he never joined any company or regiment, never took the oath of allegiance, bore arms, or did any duty whatever in the Confederate service; that while in prison at Salisbury, N. C., he offered to enlist, thinking he might thus gain an opportunity to escape, but subsequently finding there was no chance of escape, withdrew his offer and was put back into prison and kept there until paroled. The records of the War Department failed to show that he enlisted in the Confederate service but did show that he was paroled as a prisoner of war on February 26, 1865.

In the case now under consideration there is no evidence corroborating the claimant's statement as to his purpose in joining the Confederate army except the fact of his voluntary return to the Union lines in April, 1865. He does not appear to have convinced the com-

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rades whom he left behind in prison at Andersonville that his purpose was laudable or patriotic, for he says that when he subsequently met them at Columbus, Ohio, some of them would not speak to him. As the case now stands, I can see no good reason for disturbing the action of your Bureau, and the same is, therefore, affirmed.

MARRIAGE AND DIVORCE—EVIDENCE—PRESUMPTION.

LOUISA C. GERMAIN (WIDOW).

Soldier married Martha Pinkney in 1841 and they lived together as husband and wife until a short time before the civil war, when he separated from her. He married claimant in June, 1871, and also had a second marriage ceremony performed in 1888.

Martha, the first wife, died June 22, 1897, and the soldier died November 30, 1897. No evidence of a divorce between soldier and his first wife, Martha, is shown, but it is held that the presumption is, in the absence of proof to the contrary, that said soldier had been divorced from his first wife at the time of his second marriage to claimant. (Citing Jennette Burton, 9 P. D., 31; Hull *v.* Rawles, 26 Miss., 471; Holmes *v.* Holmes, 6 La., 463; Blanchard *v.* Lambert et al., 43 Iowa, 228; Carroll *v.* Carroll et al., 20 Texas, 731, and Patterson *v.* Gaines, 6 Howard, 550.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 14, 1900.

Charles Germain was in the naval service of the United States from May 17 to June 4, 1861, and from August 25, 1861, to June 25, 1863. It appears that he was acting master of the United States steamer *Cincinnati*, and that he died on November 30, 1897.

On December 23, 1897, Louisa C. Germain, as his widow, filed a declaration for widow's pension under the general law and on January 22, 1898, she also filed a claim for widow's pension under the act of June 27, 1890, designated by certificate No. 13,681. Both claims were rejected on September 19, 1899, upon the ground that claimant was not shown to be the widow of the sailor, inasmuch as it appeared from the evidence that he had a lawful wife living and undivorced at the time of his marriage to the claimant.

Upon appeal being taken from this action the same was affirmed on January 20, 1900. The syllabus of the opinion affirming the action of rejection is as follows:

The evidence shows that at the time of claimant's marriage to the sailor he had a lawful wife living and undivorced, so that the marriage was void ab initio. This is not only the general rule of law, but is in accord with the decisions of the courts, especially in Louisiana and Mississippi, where these parties lived. And there is no evidence to show that a new contract of marriage or other form of consent was entered into after the removal of the impediment, that is, the death of the first wife, which was five months before sailor's death. Marriage can not be presumed, and rejection of claim was proper.

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During the month of April, 1900, claimant filed additional evidence as a basis for reopening her claim, which, upon being considered, was, on June 16, 1900, held to be insufficient to warrant any change of action.

Assigning said action as error, appeal was taken on June 19, 1900, resting upon the contention that the evidence on file shows that she is the widow of the sailor, and especially that the evidence authorizes the contention that a common-law marriage arose under the laws of Mississippi, after the removal of the impediment to her marriage with the sailor, by the death of the first wife, if there was any prior marriage. In a supplemental appeal filed on June 23, 1900, it is also contended that the sailor had no living wife at the time he married the claimant.

In order to intelligently consider the issues presented by the appeal it will be necessary to recite the material facts disclosed by the record and the evidence in the case. The sailor, it appears, was pensioned under the general law from May 6, 1890, at the rate of $20 per month, by reason of a disability resulting from a shell wound of the left thigh and malarial poisoning; and, according to the certificate of the health officer of Lauderdale County, Mississippi, he died on November 30, 1897, "from cardiac failure superinduced by an overloaded stomach, which was diseased with catarrh of long standing."

From the statement of the claimant to the special examiner it appears that she was born in the State of Alabama, and from there removed with her parents to Mississippi; that her parents died when she was quite young, and subsequently she resided in various portions of the last-mentioned State and in Alabama. She made the acquantance of the sailor in Mobile in the spring of 1871, who was at that time a steamboat man, and had come from New Orleans for the purpose of inspecting some vessels. Appellant says that she married him in the city of New Orleans on June 20, 1871, and that there were two witnesses to the marriage, a Mr. Elsmore and another gentleman whose name she has forgotten; that both of those witnesses are dead. The claimant also states that she and her husband had a second marriage ceremony in the city of New Orleans on December 4, 1888. Concerning this second marriage, the claimant said:

> The only reason for that ceremony was to make it easy for me in my pension claim, and it was done at sailor's suggestion, because he said he had lost the certificate of the first marriage and had never had it recorded, and he did not want me to have trouble proving a marriage after his death.

In her statement the claimant further said:

> That was a secret marriage; we did not want it known because we feared it would make a talk, and I did not know what people might say.

There is a record of this second marriage in proper shape on file in the record of the case. It is also abundantly shown that the claimant

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and sailor lived together as man and wife near Meridian, Miss., from 1871 up to the time of his death, in 1897, and that they were always regarded and believed to be man and wife by their neighbors and friends.

It appears also that the present Congress under a special act, approved on May 20, 1900, has authorized and directed the Secretary of the Interior to place the claimant's name upon the pension roll at the rate of $20 per month.

There is some testimony to the effect that the sailor lived with a woman by the name of Bryant as man and wife some time after the termination of his service. It is immaterial, however, what his relations with that woman were, as she died in 1866 or 1867, prior to his marriage to the claimant.

The claimant's pending applications were denied because it was inferred from the evidence that the sailor was married to Martha Pinkney in the State of New York in 1841; that he lived with said wife, six children being born to them, until a short time before the civil war, when he separated from her; that said wife was living and not divorced from him in 1871 and in 1888, and that she died in June, 1897, about five months before the death of the sailor.

The issues raised by the appeal under the above-stated facts are threefold: First, it is contended that there is not sufficient proof on file to show that sailor married Martha Pinckney in 1841 or at any other time. Second, that if such first marriage is shown to have occurred, then the law presumes in favor of both marriages, and in support of the second marriage carries the presumption that the first was legally dissolved by death or divorce. Third, that after the removal of the impediment by the death of the first wife a common-law marriage arose in legal contemplation.

In this connection it is pertinent to inquire into the evidence relating to the first marriage. A special examination was conducted in the month of July, 1899, at which time four witnesses were examined.

Carrie G. Childe appeared before the special examiner as a witness. She stated that she was 42 years of age, and that the sailor was her uncle. The witness said, substantially, that the sailor married Martha Pinkney, but she did not know when, and that she had been informed that they separated before the war; that she knows "there never was any legal separation;" that after the separation of husband and wife the latter lived at various places and died at the home of her daughter; that there were five children born of said marriage.

Julia A. Germain, aged 82, appeared as a witness before the special examiner. Among other things the witness said:

I am the sister of the late Charles Germain. He married for the first time Martha Pinkney, at Little Neck, Long Island, New York. I can not state when it was, but I have a record of it in an old Bible, which I now show you.

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To this the special examiner adds the following:

I have examined same, and I have taken an exact copy. Charles Germain was married to Martha B. Pinkney January 14, 1841. The Bible was issued at Cooperstown, N. Y., 1827, by H. & E. Phinney, publishers, and the entry of marriage indicates that it was written a great many years ago.

The witness added that there were six children, the issue of said marriage; that said parties lived together until about the time the youngest child died, when, on account of "some unpleasantness," they separated. The witness further said:

I am positive that his wife never obtained any divorce from him, and I never heard that he obtained a divorce from her.

The witness also says that she was at the wedding above mentioned.

The next witness before the special examiner was Charles Germain, the son of the sailor; age, 51 years. Among other things the witness said:

I am the son of the late Charles Germain. My mother's name was Martha B.; maiden name was Pinkney. My father was in the Navy; do not know his service. My parents separated before he went into the Navy; after he came out of the Navy he came home once and wanted his family to take him back; we would not do so; he went away, and I have not seen him since. I think this was in or about 1871. After he left my mother made her home with me at Great Neck and Roslyn, Owens County, N. Y., up to 1882. I think I was about 8 years old when he left my mother, which would make it about 1856 or 1857. After my mother left me she went to live with my sister Emma, now Mrs. Rodgers, * * * and she lived with her in New York City, N. Y., from 1882 until her death, June 22, 1897. I am positive that my mother was never divorced from my father, and I never knew or heard of my mother receiving any notice of divorce.

Mrs. Mary E. Rodgers added nothing material to the testimony of her brother. She also said: "I am positive that my mother was never divorced from my father," and "I never knew my mother to get any notice of any divorce proceedings on the part of my father. I am perfectly satisfied that no divorce was ever granted."

It appears also that a search was made among the records of the courts of Owens County and the city of New York to ascertain if any divorce proceedings had been instituted by the sailor against the first wife during the period intervening between 1871 and 1888, and no such proceedings were found.

In the light of the facts above recited it has been assumed as a proven fact that the sailor not only had a living wife at the time of his marriage to the claimant, but that it has also been positively shown that there was no divorce from said first wife. It will be observed that there is only one witness to the first marriage, and no witness has positively testified or could know that the sailor did not obtain a divorce from the first wife. As to the conduct of the sailor in that respect, the testimony is limited to statements that the witnesses had not known or heard of any divorce proceeding instituted by him.

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This testimony amounts to nothing more than a declaration on the part of the witnesses that they did not know whether the sailor had obtained a divorce from his first wife or not. This is necessarily the effect of the testimony, for the reason that the sailor may have instituted suit in some other State, in which notice may have been served by publication. Besides, it certainly is not shown that the first wife did not at any time receive notice of divorce proceedings on the part of the sailor.

The record of the case being silent, therefore, in respect to divorce, it is pertinent to inquire what the law determines in such cases. It may be assumed as a principle of well-nigh universal application that the presumption of innocence and legality obtains as to all proven marriages, and that, in cases where one party has been shown to have married twice, the presumption of the validity of both marriages obtains until the contrary is shown by competent proof. Where a second marriage is shown the legal presumption at once arises that the first marriage had been dissolved either by death or divorce at the time the second was contracted.

In the case at bar there is no proof, other than the statement of the claimant, that she was married in New Orleans in 1871, but it is abundantly shown that from that year she lived with the sailor as his wife near Meridian, Miss., until his death in 1897, and that the parties represented themselves to be man and wife and were so regarded by the people of the neighborhood. This is sufficient in law to raise the legal presumption that a marriage ceremony had been performed. It is also shown by record evidence that they were married in 1888. It does not devolve upon the claimant in this case to show that any former marriage of the sailor had been dissolved by death or divorce, but her marriage is presumed to be legal until it is shown by competent proof that his former marriage has not been so dissolved.

This principle is recognized by the Department in the case of Jennette Burton (9 P. D., 31), wherein it is announced that—

> The burden of proof against the validity of the ceremonial marriage does not rest upon the widow, but upon the parties who attack the validity of such ceremonial marriage, and the presumption of law favors innocence of the latter marriage until the contrary is proved.

In support of the above-stated principle the case of Hull *v.* Rawles (26 Miss., 471) is cited, a case from the State in which these parties resided, and which is exactly in point. It is therein held as follows:

> The fact that the deceased was living in 1844 with a woman believed to be his wife is no evidence that she was living on the 6th of December, 1848 (date of second marriage). This marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity. The statement of Rawles (made after his second marriage) that his first wife was then living in Georgia, while it could have been used as evidence against him in a proper proceeding in which he was directly interested or could be affected, can not be used to the prejudice of the

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petitioner. By assenting to the marriage he admitted that he could then legally enter into the alliance. The statement may have been true that his first wife was then living, and still it would not necessarily follow that she was in a legal sense his wife, as the parties may have been legally divorced.

Applying that principle in the case at bar, it may have been true, and doubtless was true, that sailor's first wife was living at the time he contracted the second marriage, but it does not follow that she was still "in a legal sense his wife." The presumption is that the sailor had obtained a divorce from the first wife, and that presumption prevails until the contrary appears by competent proof.

Stewart on Marriage and Divorce, in section 126, announces a general principle relating to the legality of marriages, as follows:

The presumption of innocence sometimes gives rise to a presumption of marriage.

Again, the same author says:

So, sometimes, if a second marriage is proved, a previous divorce of the first one may be presumed, though, in general, a divorce can be proved only by the record.

One of the leading cases cited by the text writers in support of the doctrine that the presumption of innocence sometimes gives rise to a presumption of marriage, is that of Holmes *v.* Holmes (6 La., 463), a case which arose in the State in which these parties were married. In that case the following principles are announced:

Marriage is regarded in no other light than a civil contract highly favored.

The Louisiana code does not declare null a marriage not preceded by a license and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. The laws relating to forms and ceremonies are directory to those alone who are authorized to celebrate marriages.

Marriage may be proved by any species of evidence not prohibited by law which does not presuppose a higher species of evidence in the power of the party. Cohabitation as man and wife furnishes presumptive evidence of a preceding marriage.

It will thus be seen that marriages are proven in the State of Louisiana in the same way as in all other States where there is no statutory limitation. There is no such limitation in the laws of Mississippi, the State in which these parties resided.

The case of Blanchard *v.* Lambert et al. (43 Iowa, 228), which is regarded as a standard authority on the question involved in this case, contains a statement of the principle, as follows:

Where a husband and wife separate and the former lives and cohabits for years with a woman whom he claims and who is reputed to be his wife, the law presumes a divorce from the first wife, and the latter may legally marry again.

It is therein further held:

The plaintiff and her former husband, Musgrave, must have separated as early as May, 1858, and there is no evidence that they ever cohabited together as husband and wife after that time. The plaintiff did not marry Blanchard until March, 1867, nearly nine years after her separation from Musgrave. For several years prior to

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this time Musgrave was living with a woman who claimed to be, whom he claimed to be, and who was reputed to be his wife. The law presumes that this cohabitation of Musgrave was lawful and not criminal, and that he had obtained a divorce from plaintiff.

This adjudication arose under a petition filed by the plaintiff asking that commissioners be appointed to admeasure her dower in certain lands of which her second husband died seized and possessed. She was held to be his lawful wife, and therefore entitled to dower in his lands.

The same principle is announced in the case of Carroll *v.* Carroll and others (20 Tex., 731). This case arose under a contest of two sets of children as to their rights in the estate of the deceased father. It is therein held:

Where husband and wife separated in 1829 and lived at places remote from each other, and the wife married again in 1835 and the husband in 1837, and the husband and last wife lived together as man and wife until his death, in 1853, in a controversy between a child by the first wife and the second wife and her children respecting the estate, it was held that the second marriage of the husband must be held valid without proof of a divorce between the husband and first wife, notwithstanding the second knew of the first marriage of her husband, and that his first wife was still living, but married to a second husband.

This ruling was based upon the presumption that the first wife had obtained a divorce before she married the second time, as will appear from the further ruling in said case, as follows:

But it is further objected that the deceased Nathaniel had a wife living at the time of his marriage with the defendant Susan, and that this was within the knowledge of the defendant. But the proof is that the deceased had also been separated from his wife for about eight years, and that his wife Elizabeth had married again in 1835, more than two years prior to the marriage between the defendant Susan and the deceased Nathaniel. There was no evidence that the first wife of the deceased had obtained a divorce prior to her second marriage. But the law in favor of innocence raises such presumption. And the defendant Susan, if she knew of the existence of the first wife, might have acted on this presumption in contracting the marriage relation with Mr. Carroll.

If appears that the sailor separated from his wife before the civil war, for what reason does not appear, and that the first wife changed her residence a number of times subsequent to the separation. It may be that sailor instituted divorce proceedings against her in some other State, in which service may have been perfected by publication. In such a proceeding he may have obtained a divorce without even the personal knowledge of the first wife. It is, therefore, impossible that the witnesses sworn by the special examiner could know whether or not a divorce had been obtained.

In the case of Patterson *v.* Gaines (6 Howard, 550) the Supreme Court of the United States announced the principle which is applicable in this case. The material facts in the case are as follows: Daniel Clark, a wealthy citizen of the State of Louisiana, died in 1813, leaving

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a will made in 1811, in which he bequeathed his entire estate to his mother. He also left a surviving child, Mrs. Gaines, who was the issue of a marriage contracted in Pennsylvania a number of years prior to that time. Under the laws of Louisiana a person who had a child viving him could not devise more than one-fifth of his estate. Mrs. Gaines instituted suit against the legal representatives of her father and such other persons as had come into possession of any portion of his estate, by purchase or otherwise, to recover her interest in said estate. The only defense made to prevent recovery was that the marriage of the plaintiff's father and mother was illegal, as the mother had a living husband from whom she had not been divorced at the time of her second marriage. The case came before the Supreme Court of the United States under the issue thus raised, and upon the hearing that court held, in effect, as follows:

Where a marriage is proved, but alleged to be invalid by reason of a prior marriage, the burden of proof is on those who assert its invalidity to establish the validity of the prior marriage.

In the light of the authorities above cited it was error to reject the applications of the claimant upon the ground that she was not the widow of the sailor. The action is therefore reversed, with directions that the cases be readjudicated in accordance with this opinion.

The papers in the case are herewith returned.

MARRIAGE AND DIVORCE—ACT JUNE 27, 1890.

MARTHA J. KIRKLAND (ALLEGED WIDOW).

Claimant, the widow of Samuel B. Kirkland, married Abraham Jackson in 1865; Jackson obtained a divorce, a vinculo, from her in 1881.

Held: The divorce decree did not put her back, as to the rights under the law, as the widow of Kirkland. She forever destroyed her status as the widow of Kirkland when she entered into a valid marriage contract with Jackson.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions.

Martha J., an alleged widow of Samuel B. Kirkland, formerly a private in Company E, Twenty-third Iowa Volunteer Infantry, filed her application under the act of June 27, 1890, on June 5, 1897, claim being rejected on September 8, 1897, on the ground of no title. An appeal was filed on August 30, 1898.

The facts are as follows:

Claimant, Martha J., was legally married to Samuel B. Kirkland, on March 19, 1844. Said Kirkland died in the service on August 26, 1863, and said Martha J. married Abraham Jackson on March 30, 1865. Said Jackson obtained a divorce from her on December 13, 1881. The

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above facts are not disputed, but the attorney in his appeal raises an issue of law, the appeal being as follows:

The Commissioner of Pensions in his letter of August 8, 1898, admits that proof has been filed that a divorce a vinculo matrimonii had been granted to Mrs. Jackson long before she applied for a pension (in 1881), but claims that, because it does not show that the marriage of Mrs. Jackson with her second husband was declared void ab initio, therefore she is not entitled to a pension as the widow of her first husband and soldier, Samuel B. Kirkland.

In this conclusion, it is respectfully submitted, the Commissioner is mistaken.

Marriages are set aside by the courts, as authorized by the laws of the different States, first, for causes existing at the time of the marriage; second, for causes existing subsequent to the marriage. (See Code of Iowa, secs. 3175–3182, Code of 1897; secs. 2223 and 2231, Code of 1873.)

In either case the divorce is absolute.

If the decree of 1881 of the Pottawattamie County district court had been granted for the first cause, the Commissioner admits Mrs. Jackson would be entitled to a pension, but being for the second cause he denies it. This is a distinction without a difference. The law makes no such distinction between the two kinds of divorce. In either case it is a divorce a vinculo matrimonii, and is absolute on its face.

After the decree of 1881 Mrs. Jackson was no longer the wife or the widow of Abraham Jackson, her second husband. By it she was restored to the position she occupied before her second marriage as the widow of Samuel B. Kirkland, and as such widow of the deceased soldier I insist she is entitled to a pension under the law of June 27, 1890.

In support of the legal position herein taken I refer to volume 5 of the American and English Encyclopedia of Law, page 746, under head of "Divorce;" also to page 839 of the same volume, subdivision 4, in which it is declared that a decree a vinculo matrimonii dissolves all ties and destroys the relation of husband and wife. After the date of the decree a husband has no wife and the wife has no husband and the woman is a femme sole.

This language in the text is fully sustained by numerous citations, and to which I refer. I will make no others. The language of the text is the law of the land.

I know that every possible objection is now made to the granting of pensions, but this one is so inexcusable that it ought not to be sustained.

The Commissioner of Pensions is certainly in error in refusing a pension to Mrs. Jackson, and I again ask that his decision be reversed and a pension granted to her.

The contention made by the attorney is a novel one, but it will not bear the test of sound argument.

The word "divorce," while variously used in text-books and court decisions, has nevertheless a clearly defined and technical meaning. Bouvier defines it as "The dissolution or partial suspension, by law, of the marriage relation;" the editor going on to state:

The more correct modern usage, however, confines the signification of divorce to the dissolution of a valid marriage. * * * A sentence or decree which renders the marriage void ab initio and bastardizes the issue should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. (Bouvier's Law Dictionary, title Divorce.)

Stewart says upon this point:

A decree separating parties validly married is a decree of divorce; a decree declaring a void marriage void, or making a voidable marriage void, is a decree of nullity. (Stewart on Marriage and Divorce, sec. 10.)

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Now, while without doubt the word divorce signifies in legal parlance a dissolution by a court of competent jurisdiction of the marriage contract, and to this extent might possibly include some cases where parties were freed from the marriage bond by reason of an actual voidable marriage, yet one must always look to the decree itself to ascertain its precise legal effect. The decree in the case at bar is as follows:

STATE OF IOWA, *Pottawattamie County, ss:*

Be it remembered, that at a term of the district court within and for the county and State aforesaid, begun and holden at the court-house in the city of Council Bluffs, on the first Monday of December, A. D. 1881, to wit, on the 13th day of December, A. D. 1881, Hon. J. R. Reed, judge of said court, in and for the fifteenth judicial district of said State, presiding. On the — day of said term, it being the 13th day of December, A. D. 1881, among other, the following proceedings were had, done, and entered of record, to wit:

ABRAHAM JACKSON
vs.
M. J. JACKSON. } No. 3276.

And now, on this 13th day of December, 1881, comes on this cause for trial, a default having been heretofore entered, to wit, on the 6th day of December, 1881, at which time the plff. appears by his attys., Sapp & Lyman, and the deft., though duly and legally notified, failed to appear or answer, and was duly adjudged in default.

And the cause being submitted to the court, and the court having examined the evidence and being fully advised, finds for the plff.

Whereupon it is ordered, adjudged, and decreed by the court that the bonds of matrimony heretofore existing between plff. and defendant be, and the same are hereby, dissolved, and that plff. be, and he hereby is, forever and absolutely divorced from said deft. and restored to all his rights as an unmarried man, and that he pay the costs of this action, taxed at —— dollars.

The causes for which the decree was granted are not set forth in the decree, but the precise nature of the decree is patent upon the face of the judgment of the court. It dissolved the bonds of matrimony. If there had been no legal matrimony, the decree would have so stated, and it would then have been a decree of nullity. Stewart, in his work on Marriage and Divorce, Chapter XL, draws the distinction between various kinds of divorces, as well as degrees of nullity, and states, in sec. 412:

Where the divorce, so called, is granted for a cause which affects the original validity of the marriage, the decree is properly one of nullity.

Citing the following form as illustrative of his statement—

Therefore the court doth hereby pronounce, decree, and declare that the said pretended marriage so had and solemnized between the said W. H. M. and the said M. B. P., otherwise called M. B. M., was and is wholly and absolutely null and void to all intents and purposes whatsoever, and the court doth hereby further pronounce, decree, and declare that the said W. H. M. was and is free from all bond of marriage with the said M. B. P.

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It needs no extended argument to show that while a divorce decree may, in common parlance, include a decree of nullity, yet the effect of the decree of nullity is vastly different from a decree of divorce, either nisi, mensa et thoro, or a vinculo. No one, if he or she has contracted a marriage which is neither void nor voidable, can obtain a decree of nullity.

A decree of nullity determines that the parties never were husband and wife (Stewart on Mar. and Div., sec. 429), and makes void what might otherwise have been valid. * * * It declares no marriage ever existed. (Ibid., sec. 147.)

The pseudo husband has not and never did have any right over his matrimonial partner. She was never under coverture. In short, all acts performed by them arising out of the relation of husband and wife are as valueless and void as if they never had assumed such a relation.

The effect of a regular divorce decree—a vinculo—is, however, of much less extent. It calls a halt from the date of the decree, but can not, from its very nature, effect transactions which occurred prior to the granting of the divorce.

When a legal marriage has taken place it can be dissolved only by death or by a court of competent jurisdiction.

In the present instance the decree is admitted to be a vinculo—a regular divorce decree—dissolving the bonds of legal matrimony heretofore entered into. It holds, inferentially, that claimant was legally married to Jackson, but also from and after December 13, 1881, she was no longer his wife. It does not pretend to put her back into any other former status from which she had been illegally separated. It did not make her again the widow of Kirkland. It made her a femme sole, wholly independent of Jackson, and having once legally ended her status as the widow of Kirkland by marrying Jackson, there was no way known to the law by which she could again claim any rights under Kirkland.

It may be repeated that when this claimant entered into a valid marriage contract with Jackson she effectually destroyed, in the eyes of the law, her status as the widow of Kirkland, and no court in any State could restore her to her former pensionable status and rights as the widow of Kirkland.

Claimant is now a femme sole; she is neither widow nor wife in the law. She is a divorced woman, and can claim no more rights under the pension law as the widow of Kirkland than she can under the common law as the wife of Jackson. Her status as widow was destroyed by her own act. The law destroyed her status as wife of Jackson.

The attorney's contention is fallacious in the extreme and has no foundation in law.

The views herein expressed as to the effectiveness of the quoted

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divorce decree are based upon the presumption that the said decree is a valid one. The full judgment roll or a transcript thereof is not before the Department, and the decree, per se, is certainly faulty as evidence in that it does not recite the grounds for the divorce granted in a State in which decrees of divorce are granted only on statutory grounds. It may be that such a jurisdictional fact might be presumed in the absence of the entire judgment roll, but even if the said decree were void it could avail claimant nothing in this case. If the decree was void for want of a proper statement of jurisdictional facts it would but leave claimant in the status of the wife of Jackson; so it is not necessary to enter into an extended discussion of the validity of said decree. A proper conclusion could not be reached on such point on the papers now in evidence.

The papers are returned. Action affirmed.

CONSTRUCTION—ACT MARCH 3, 1899—DESERTED WIFE—RETROACTIVE LAWS.

MARY ANN ROTHERY *v.* HENRY N. ROTHERY.

The act of March 3, 1899, is prospective, not retroactive, in its operation, and the desertion named therein refers only to such as occurs subsequent to the passage of the act. The word "desertion" in said act is used in its general legal sense, and means the willful withdrawal of one of the married parties from the other or the voluntary refusal of one of the married parties to renew a suspended cohabitation, without legal justification.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 5, 1900.

Henry N. Rothery, late sergeant, Company D, Fifth United States Artillery, appealed November 10, 1899, from the Bureau action of June 3, 1899, allowing the claim of Mary Ann Rothery (alleged deserted wife), filed March 24, 1899, under the act of March 3, 1899, and directing that one-half of his pension be paid to soldier's said wife.

Appellant contends that on May 12, 1899, he was served with a notice allowing him thirty days in which to file evidence in defense of his wife's said claim, and that the claim was adjudicated prior to the expiration of said thirty days, or on June 4, 1899; that his wife refuses to live with him; that she is not in necessitous circumstances, but makes a good living, while his army disabilities render him unable to work; that he is 70 years of age, and that since being deprived of one-half his pension he is dependent upon charity, and that he has filed several affidavits showing that his wife refuses to live with him or to permit him to live with her.

It does not appear that his wife has been served with copies of these affidavits or of this appeal.

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Soldier enlisted September 25, 1857, and was discharged after reenlistment, March 31, 1869.

At the date of the filing of said wife's claim he was in receipt of a pension for injury to right temple, and disease of liver and stomach, of service origin, at $30 per month, and had a claim for increase pending under act of July 14, 1892.

The files in the case show a notice dated May 12, 1899, wherein soldier was notified that Mary Ann Rothery did on March 24, 1899, file an application for one-half of his pension under the provisions of the act of March 3, 1899, on the ground that he had deserted her and failed to contribute to her support; that thirty days would be allowed him to file such evidence under oath in the premises as he might deem necessary, and that the notice should be attached to and filed with his reply. This notice appears to have been filed June 6, 1899, together with testimony denying desertion, and which if true would constitute a complete defense to the wife's claim. This notice and the accompanying affidavits were filed within the thirty days named in said notice.

It appears, however, from the face brief that the wife's claim was submitted for approval June 3, 1899, and prior to the expiration of said thirty days and prior to the filing of the evidence by the soldier.

While the face brief fails to indicate when final action was taken, it does appear that the wife's claim was in course of adjudication and was submitted for approval by the examiner June 3, 1899, and that the pension agent, the auditor, and the pensioner were notified on the same date.

It further appears from the papers in the case that the wife's claim was specially examined in July, 1899, and on July 19, 1899, the special examiner reported that—

> The wife has drawn one-half of his pension for one quarter; that, believing the division of the pension is just, recommend no further action.

Mrs. Rothery testified July 11, 1899, that she had received one-half of soldier's pension for one quarter (three months) as his deserted wife.

This would indicate that the wife's claim had been adjudicated by the Bureau prior to the special examination.

The act of March 3, 1899, under which the said wife's claim was filed, provides, so far as cases of this class are concerned, as follows:

> That in case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, * * * the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife.

It is plain from the reading that this act is prospective, not retroactive, in its operation, and that the desertion named in the act refers only to such desertion as occurred subsequent to the passage of the act.

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The language of the act is, "shall for a period of over six months desert." * * *.

The act created a new condition and attached a new disability affecting the right of the pensioner. It also created a new right in behalf of a new class of persons, and operates only upon acts done and transactions occurring after the act took effect.

It is a fundamental rule in the construction of statutes that they are to be construed to operate prospectively, and not retrospectively, unless the language clearly precludes all question as to the intent of the legislature that they should operate retrospectively. (See Sedgwick on Construction of Statutory and Constitutional Law, p. 160–161, and note (*a*); Sutherland on Stat. Con., par. 206, and cases cited; Endlich on Interpretation of Statutes, par. 271, and cases therein cited under note 25; Maxwell on Interpretation of Statutes, p. 191; Potter's Dwarris on Statutes and Constitutions, p. 74–162; Bouvier's Institutes, 29; 23 Am. and Eng. Ency. of Law, p. 448.)

Retrospective statutes are looked upon with disfavor by the courts, and are strictly construed. As stated in the case of United States *v.* Heth (3 Cranch, 298–413):

> Words in a statute ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature can not be otherwise satisfied. See also the case of Jennett Thompson (7 P. D., 264).

Sharswood, J., in the case of Taylor *v.* Mitchell (57 Pa. St., 211), said:

> There is no canon or construction better settled than this, that a statute shall always be interpreted so as to operate prospectively and not retrospectively unless the language is so clear as to preclude all question as to the intention of the legislature. Retrospective laws generally, if not universally, work injustice, and ought to be so construed only when the mandate of the legislature is imperative. * * * The language of the act of assembly, in its ordinary use and meaning, relates to wills thereafter to be made. It is only by a technical construction that it can be made to bear a different sense. Such a construction might justly be applied to a law which on its face appears to be retrospective, in order to restrain it to a prospective operation, but it would certainly be a novelty to apply it conversely. See also, Gable's Ex. *v.* Daub (4 Wright, 217); United States *v.* Heth (3 Cranch, 399); Murray *v.* Gibson (15 How., 421); Harvey *v.* Tyler (2 Wall., 329); Chew Heong *v.* United States (113 U. S., 559); United States *v.* Ala. Great Southern R. R. Co. (142 U. S., 615–621).

Statutes speak from the time they take effect, and their taking effect may depend on a future contingent event. See Sutherland on Con. Stat., pars. 71, 72, 107, and 160.

A prospective statute is one which regulates the future and operates upon acts done and transactions occurring after it takes effect, while a retrospective statute operates upon a subject already existing or an act done. (See Sutherland on Con. Stat., par. 206.)

Prior to the passage of the said act of March 3, 1899, a pensioner's desertion of his wife was no ground for withholding a portion of his

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pension from him and paying it to his wife. How, then, can such desertion, prior to the passage of said act, operate to defeat his exclusive right to his pension money? To hold such a construction of the act might operate to deprive a pensioner of the exclusive control of his pension money, although living in harmonious domestic relation with his wife, because some time in the past he had temporarily deserted her for six months and a day.

Prior to the passage of said act of March 3, 1899, it had been the uniform policy of the pension laws to guard and protect the soldier pensioner in the sole and exclusive possession and enjoyment of his pension.

Section 4747, Revised Statutes, provides:

No sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, whether the same remains with the Pension Office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner.

Section 4734, Revised Statutes, passed as early as May 20, 1836, provided that--

The provisions of law which allow the withholding of compensation of any person who is in arrears shall not be construed to authorize the pension of any pensioner of the United States to be withheld.

Section 4745, as amended by the act of February 28, 1883, provides:

Any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension which has been or may hereafter be granted shall be void and of no effect; and any person who shall pledge, or receive as a pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension or pension certificate which has been or may hereafter be granted or issued, or who shall hold the same as collateral security for any debt or promise, or upon any pretext of such security or promise, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars and the costs of the prosecution; and any person who shall retain the certificate of a pensioner, and refuse to surrender the same upon the demand of the Commissioner of Pensions or a United States pension agent, or any other person authorized by the Commissioner of Pensions or the pensioner to receive the same, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one hundred dollars and the costs of the prosecution.

On December 21, 1893, Congress provided:

That any pension heretofore or that may hereafter be granted to any applicant therefor under any law of the United States authorizing the granting and payment of pensions, on applications made and adjudicated upon, shall be deemed and held by all officers of the United States to be a vested right in the grantee to that extent that payment thereof shall not be withheld or suspended until, after due notice to the grantee of not less than thirty days, the Commissioner of Pensions, after hearing all the evidence, shall decide to annul, vacate, modify, and set aside the decision upon which such pension was granted. Such notice to grantee must contain a full and true statement of any charges or allegations upon which such decision granting such pension shall be sought to be in any manner disturbed or modified.

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These various provisions show with what jealous care Congress has guarded the rights of the pensioner, and had Congress contemplated or intended by the act of March 3, 1899, to divert and withhold from him a portion of his pension money for acts of omission or commission prior to the passage of the act—acts in no degree affecting the degree of his physical disability—it would certainly have manifested its intention by apt and appropriate, clear and unmistakable language.

Following the history of this act, from its introduction in the House as H. R. 1055 to its final passage, there is nothing in the discussion of the bill, either in the House or Senate, to indicate any intention to make the act in any manner retroactive or retrospective in its operation. On the contrary, a provision in the bill that "the entrance of the pensioner into any State Home for soldiers and sailors as an inmate thereof shall constitute prima facie evidence of desertion * * * " (Congressional Record, 3d Session 55th Congress, Vol. 32, Part 1st, p. 379), was stricken out, the House having refused to concur in that portion of the Senate amendment.

There is therefore no ground upon which to base an argument that the act was intended to be retrospective, but on the contrary its plain language shows it to be prospective in its operation.

As the wife's application was filed March 24, 1899, but twenty-one days after the passage of the act, it was premature and should have been rejected, as it was impossible for her to prove the desertion named therein.

It is to be noted that this is not a claim under the second or third proviso of said act of March 3, 1899.

Even assuming that the six months' desertion named in the act refers to a desertion for that period prior to the passage of the act, I am of the opinion that desertion within the meaning of that term as used in said act is not established by the evidence in this case.

The wife of the pensioner testified by affidavit March 23, 1899, that about five years prior thereto soldier deserted her and had not since contributed anything to her support, and this was corroborated by the affidavit of Mrs. Heard and others.

The soldier in reply in an affidavit filed June 6, 1899, testified that the reason he did not live with his wife was that she would not allow him to do so; that in 1889 he was dismissed from a $1,200 clerkship in the War Department, having previously been absent sick with pay for eleven months, and was at the time in the country under medical treatment, and that upon his return his wife treated him as an unwelcome stranger; that subsequently he went to the hospital for treatment, incurred some debts incident to his treatment, and for a time could give his wife no money; that she notified him through their son that he must keep away from her house, as she would have nothing to do

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with him, and that she has not spoken to or taken the slightest recognition of him since.

This the wife denies, and a number of witnesses state generally that soldier deserted her.

Her own testimony on special examination corroborates the soldier's statements, that his wife refused to live with him.

In answer to the question by the special examiner, "Has your husband ever asked you to live with him," she replied:

> I have never given him a chance. He has never written me asking that privilege. * * * There would be no use of our living together again, because it would always be the same thing. We could not live happily together. * * *

The testimony is very voluminous and tends strongly to show affection on the part of the husband for his wife and children, while there is an entire lack of testimony on the part of the wife of any affection on her part for her husband since the date of the alleged desertion and for some time prior thereto.

Upon her return from Philadelphia, and hearing that he was at the hospital, she did not go to ascertain his condition. When meeting him upon the street she refused to recognize him, and the preponderance of the testimony tends strongly to show that she refused to permit his return, and she now testifies that she will never resume her marital relations with her husband. Is she therefore in a position to charge and establish desertion? Is not she the deserting party?

The word "desertion" in said act of March 3, 1899, is used in its general legal sense, and desertion, in law, is a willful abandonment of an employment or a duty in violation of a legal or moral obligation, and, as applied to the matrimonial relation, means the willful withdrawal of one of the married parties from the other or the voluntary refusal of one of the married parties to renew a suspended cohabitation, without justification, in either the consent or the wrongful conduct of the other. As stated by Bishop in his work on Marriage, Divorce, and Separation, paragraph 169:

> To constitute desertion there must be a simultaneous separation and intent to desert, and it does not exist without the presence of both. The two need not begin together, but the desertion commences whenever to either one the other is added.
>
> The affirmative elements are two, the cohabitation ended and the offending party's intent to desert. Negatively, it must be without legal justification.

As stated by Stewart on Marriage and Divorce, paragraph 251:

> To establish desertion three things must be shown: First, cessation of cohabitation; second, the intention of the mind of the defendant not to resume cohabitation; third, the absence of the complainant's consent to the separation or conduct justifying it. * * * One can not be deserted while he or she consents to the separation, and the one who intentionally drives the other away deserts such other.

Separation is not desertion, as announced in Ingersoll *v.* Ingersoll (49 Pa. St., 249), and the mere fact that parties are living apart does

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not even raise the presumption of desertion, and separation by mutual consent of the parties is not desertion in either. The consent may not be expressed, it may be inferred from conduct. (See also S. C., 256.)

So also the intent must be intended to be permanent, and the one who has the intent to desert, whether it be the one who leaves the matrimonial home or not, is the one who deserts. (Ibid., 254–255.) As held in Marker *v.* Marker (11 N. J. L., 257), "desertion is a question of intention."

The desertion must be against the will and consent of the party deserted. See cases of Rose *v.* Rose (50 Mich., 92); Better *v.* Better (Ibid., 51).

As stated by Judge Campbell in the case of Cooper *v.* Cooper (17 Mich., 205):

> Desertion can only be complained of when it is against the will of the party who is deserted. If there be a separation by consent, that consent shows that the parties deem it no grievance to be deprived of each other's society.

I am clearly of the opinion that the evidence in this case fails to establish desertion on the part of the soldier, or that he has, in the language of the act of March 3, 1899, deserted his wife. There is not only a lack of evidence establishing an intent to desert on the part of the soldier, but the evidence does establish the fact that his wife freely and voluntarily acquiesced and consented to the separation. The pensioner has at various times indicated his desire to return to his wife if she would consent, but she has persistently refused her consent, and expressly testified that she "never asked him to come back; had never given him a chance to ask her to live with him, and was glad that he had concluded to stay away;" that she "had to choose between him and my children; we could not live together, and what was the use;" that "there would be no use in our living together again," etc.

The pensioner asserts that when he left home at the time his wife was in Philadelphia he expected to return to her; that she knew he was going to the hospital before she left for Philadelphia; that he told her he would have to go because he was sick; that she afterwards sent him word by his son Harry to stay away. In this he is corroborated by Mrs. Harry Rothery and by the subsequent conduct and conversation of his wife. That when he left the house September, 1890, and went to the hospital he did not expect to go away to stay; that he went expecting to get cured; that he had never said that he would not go back to her; that he had spoken to her in the street, but she had refused to recognize him; that he would willingly live with her if she would ask him in good faith.

Both the pensioner and his wife are reported of good reputation, and the burden of proof is upon her to establish desertion on the part of her husband, against her will and consent. This I think she has

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failed to do, and even assuming that the language of the act of March 3, 1899,—

That in a case a resident pensioner of the United States shall for a period of over six months desert his lawful wife—

means *shall have*, and refers to acts of desertion prior to the passage of the act, she has failed to establish desertion, and that both upon legal grounds and upon the merits of the case her application should have been denied.

The action appealed from is accordingly reversed, and you are directed to restore to pensioner the pension of which he has been deprived by the Bureau action appealed from.

LINE OF DUTY—EVIDENCE—PRESUMPTIONS.

WILLIAM D. MITCHELL.

When prior soundness is shown, and a reasonable degree of proof that the injury was sustained in the service is furnished, there being no circumstances which would raise a suspicion that it was incurred outside the line of duty, and such injury is shown to have existed at discharge, it will be presumed that the injury was incurred in line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 11, 1900.

William D. Mitchell, formerly a private in Captain Lambert's Independent Company Pennsylvania Volunteer Cavalry, filed his declaration under the general law on December 30, 1874, alleging injury to the left arm, claim being rejected on May 29, 1896, on the ground that service origin was not shown. An appeal was filed on February 24, 1898, and the rejection was affirmed in an opinion promulgated in said case on July 14, 1899. A motion for reconsideration was filed on September 16, 1899, and is as follows:

HON. SECRETARY OF THE INTERIOR.

SIR: Referring to the claim under the general law of William D. Mitchell, deceased, Captain Lambert's Independent Company Pennsylvania Cavalry, certificate No. 683915, we have the honor to request the reconsideration of the decision of the Department of July 14, 1899, affirming the action of rejection on the ground that—

"The evidence adduced on special examination fails to show that this claimant received the alleged injury to left arm in the service and line of duty."

The syllabus of the decision indicates an error, as it would appear therefrom that the rejection was based upon what the "evidence adduced upon special examination" failed to show. The claimant filed considerable evidence which is entitled to consideration.

It is further submitted that the incurrence in line of duty should be presumed in this case under the circumstances. The claimant herein was alone, on picket duty, at the time he incurred injury of left arm, hence can not furnish the testimony of eyewitnesses. But he has furnished testimony of persons who saw him when he returned from picket duty, showing that his arm was then injured and what he then declared

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were the circumstances under which he was injured. This is circumstantial evidence of great weight. This Department admits that the rule requiring eyewitnesses may be ignored under certain circumstances, and cites that if the soldier had incurred his injury while in action it would be in accord with good practice and in harmony with the spirit of the pension laws to presume line of duty, but refuses to presume it in this case because "the operations of the command to which the soldier was attached were confined to a part of the country where a condition of war did not exist." Why, we ask, is it reasonable to presume that a horse is less liable to throw his rider in "a part of the country where a condition of war did not exist," or "in a peaceful community" than elsewhere? Being thrown from a horse is an accident not peculiar to a particular part of the country, nor to battle; and if an injury of the nature described was incurred in action there would probably be less reason for the presumption of line of duty, because in such case there undoubtedly would be eyewitnesses to the accident. Where the circumstances indicate the presence of eyewitnesses there is less reason for admitting any presumption. It is in cases such as the case at bar that it is reasonable to dispense with direct evidence.

We submit that the decision of the Department is very illiberal, because the admission of a presumption of line of duty ought to rest upon the probability whether the injury could have been incurred in the manner alleged, and the reason for the nonproduction of eyewitnesses, rather than upon the circumstances indicated in the decision of the Department, which are apparently immaterial on the question of probability.

The case at bar is practically identical with that of Thomas S. Harkins (1 P. D., 459), in which the injury was presumed to have been incurred as alleged. In that case the soldier was ruptured by the fall from a horse; not in action, but in a part of the country where a condition of war did not exist. No evidence of eyewitnesses could be furnished, but he furnished the evidence of witnesses who saw him when he returned to the regiment. It was held that the claimant's own sworn statement must be allowed some weight. There was no record of the injury, yet the Department held that the applicant was in line of duty when injured, citing the case of John B. Talbott, No. 352683, decided May 25, 1887. In support of the same principle see the cases of Thaniel Cook (5 L. B. P., 118); Reuben Moyer (13 P. D., o. s., 577); William W. Meyer (3 P. D., 246); Peter N. F. Von Ottendorf (3 P. D., 341).

It is also apparently held by the Department that line of duty could be presumed if a record of the injury existed. Unless the record showed affirmatively that the injury was incurred in line of duty we are unable to see that there would be greater reason for presuming line of duty from a record than from any other evidence showing the existence of an injury in the service. We believe the existence of the claimant's injury in service is conclusively established. A record could do no more. If a fact be admitted it would appear that the class of evidence establishing the fact is immaterial to a presumption derivable from such fact. The presumption comes from the fact, not from the antecedent evidence.

That part of the Departmental opinion specifically objected to in this motion as unsound in law is as follows:

The evidence adduced upon special examination fails to show that this claimant received the alleged injury to left arm in the service and line of duty. The fact that he returned to his home with his arm injured, as shown by some of the evidence, is not conclusive that the injury was received in the service and line of duty. None of the witnesses who testify in this case were present when the alleged injury is said to have been received, and therefore can not say that the same was received in line of duty.

To establish the incurrence of any injury in the service and line of duty, in the absence of a record there should be presented, as a rule, the testimony of persons

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who were present when the injury was received. There are, however, circumstances under which this rule may properly be ignored. For instance, where the command to which the soldier was attached was in action at the time of the incurrence it would be properly in accord with good practice and in harmony with the spirit of the pension laws to presume that an injury of the nature described in this case, at such a time and under such circumstances, was received in the line of duty, even though there were no eyewitnesses to the occurrence; but, on the other hand, when the operations of the command to which the soldier was attached were confined to a part of the country where the condition of war did not exist, acting as the agents of a State, executing the laws governing the draft, in a peaceful community, where no actual conflict with the common enemy could take place, line of duty can not be presumed except upon the unqualified and direct testimony of eyewitnesses or record.

This Department has never attempted, unless inadvertently so, as was done in the present instance, to lay down any specific rule as to what kind or class of evidence is necessary in order to prove service origin of disabilities in all cases. What might be considered proof in one case might not be so considered in another. Everything depends upon the surrounding conditions and circumstances, coupled always with the fact that a case should be proved by the highest class of evidence that the alleged incurrence is susceptible of. If one alleges honorable discharge, it should be proved by record evidence. If one alleges hospital treatment for a severe injury or disease, and the records of such hospital are intact, that record is presumed to show treatment; if it does not, the reasons why the record is silent should be satisfactorily shown. If there were, as a fact, eyewitnesses to an alleged incurrence of an injury, the testimony of such eyewitnesses should be obtained or satisfactory reasons given why such evidence is not produced. Whether the injury was incurred in time of peace, in a battle, in a crowded community, in camp, or anywhere else matters not, only so far as the circumstances surrounding the alleged incurrence demonstrate as to what is the best evidence that the case is susceptible of.

I am clearly of the opinion that the statements in the former decision in this case in so far as they attempt to lay down a rule of evidence to be observed in proving service origin are not correct. They lay down a much more strenuous rule than ever obtained in cases of like import under the common law or under any statute that I have ever seen, and such statements in said decision will be disregarded and held as of no weight.

Any evidence which tends to convince the mind that the thing sought to be proved is true is of value. The evidence of one, who although an alleged eyewitness, yet is shown to be wholly irresponsible as to truth, is of little if any value; while the evidence of a credible affiant, although not an eyewitness, yet who testifies to material facts, may carry much weight. The true test of the weight of evidence lies in its convincing power.

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The former opinion related only to testimony adduced at special examination, and the contention of the attorneys to the effect that the evidence filed by claimant and soldier is entitled to weight is a sound contention, and this case will consequently be discussed de novo.

This soldier was in the service, during the war of the rebellion, on three different occasions. He was a private in Company K, Third Pennsylvania Volunteer Infantry, from April 19, 1861, to July 30, 1861; a sergeant in Company B, One hundred and thirty-third Pennsylvania Volunteer Infantry, from August 1, 1862, to May 23, 1863, and a private in Captain Lambert's Independent Company Pennsylvania Volunteer Cavalry from August 7, 1864, to his discharge on November 25, 1864. He alleged, on December 30, 1874, that he sustained an injury to his arm on the night of October 23, 1864, by being thrown from his horse at Benton, Columbia County, Pa., while returning from picket duty. That he was sent by his captain to an improvised hospital at Bloomsburg, was there treated by Dr. Jackson, returned to his command, was discharged shortly after, and was then treated by Dr. Bunn. That the only person who knew of the actual incurrence of said disability was John Shoemaker.

John Shoemaker and Alfred M. Bryant, members of claimant's company, swore, on February 6, 1875, that "on or about the 22d day of October, 1864, at or near Benton, Columbia County, Pa., he, the said William D. Mitchell, was injured in the left arm by being thrown from his horse." This sentence is the sum of said affidavit, save its formal parts. Said Bryant, on August 7, 1896, made affidavit again to the same fact, further stating:

> I remember that Mitchell was on detail duty during the night, and was brought into camp in the morning; his left arm was broken, and he was unfit for duty and was taken to the hospital.

(It may here be stated that soldier died on February 20, 1892, being in receipt of a pension at the rate of $12 per month under the act of June 27, 1890). Joseph Karns, a member of claimant's company, swore, on July 5, 1887, that at the time and place alleged—

> Soldier incurred a fracture of the left elbow by being thrown from his horse in the following manner: While returning to camp from picket duty the horse became unmanageable and threw him upon the rough road. He was on duty by order of the captain commanding, i. e., Captain Lambert, of Chambersburg, Pa.; I saw William D. Mitchell's injury immediately after the occurrence, that is, about an hour afterwards; I saw him up to, say, the day of his discharge, which was not long after the injury was incurred by him, at Harrisburg, Pa., and he was so injured then from the effects of his being thrown from his horse, as above stated, that he did not recover the use of his arm. * * * I was in camp and saw William D. Mitchell when he was brought in, which was a very short time after his injury.

Questions propounded by the Commissioner of Pensions to the affiant failed to shake his testimony in any particular. He reiterates, in his own language, the details as recited in his affidavit.

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There is no other evidence of value regarding incurrence, and the War Department has no record of a hospital at Bloomsburg, neither has it any medical record of the said military organization.

Soldier's command was a rather irregular organization, appears to have been engaged largely in provost duty, and the absence of its records, as well as any history of the improvised hospital, is not strange. The merits of this case, under these circumstances, should not be affected because of no record, and no adverse presumption can attach by reason of no record.

Nothing further appears to have been done in this case until after the soldier's death, when his wife attempted to complete the claim. A special examination was held in 1895, and it was shown that the captain and surgeon who, it is alleged, treated soldier at the time of the injury, and soldier's own physician, Dr. Bunn, have long since been dead. So were Shoemaker and Karns, the witnesses hereinbefore referred to. It is not shown that Bryant was dead, and no endeavor appears to have been made to take his testimony.

No one testifies at special examination regarding actual incurrence save one affiant, whose testimony is very similar to that of Karns, mentioned above. He gives the same version. This affiant filed an original affidavit, sworn to on February 7, 1889, and he reiterates his statements made in said affidavit, on special examination. His reputation is, at this date, below par, but it seems that the showing on this point has reference to his personal reputation by reason of his dissolute habits rather than to his reputation for veracity. It appears that his personal reputation was good up to late years, and it is possible at the date he made his affidavit that nothing could be said against him. I would not place too much reliance upon his statements uncorroborated, but inasmuch as his evidence is to the same particular as that already quoted from other affiants of good standing it is entitled to weight as corroborative evidence.

But little endeavor appears to have been made to interview comrades, although it should be said that those who were seen do not recall the alleged occurrence. Soldier appears to have been more than an ordinarily well-educated man, bore a first-class reputation, and the testimony which follows is from parties of whom the special examiner states "are of exceptionally good character and are, for the most part, old and highly respected citizens of Johnstown, who survived the historic flood of 1889."

The soldier was married in 1865, the year after his discharge, and his widow states that when she first knew him his arm was injured to such an extent that he could bend it but little at the elbow. She testifies to the continuance of the same disability up to death. An affiant who married soldier's sister testifies that he saw him within a month after discharge and that the arm was very stiff, with only slight elbow motion; that he always carried his arm in a peculiarly noticeable

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manner, and that it remained in said condition until death. Soldier was a molder by trade, and one of his acquaintances testifies that he saw him, probably early in 1865, and that his arm was then affected. His recollection is that the trouble was in the elbow joint and below it. It appears by this affiant and others that soldier had considerable difficulty in using this arm in his trade, but that he was a good workman and always received aid from his fellow-workmen when he was called upon to do work requiring the use of the injured arm. Soldier's sister testifies that she saw him within a few days after return from the service, and her evidence as to the condition of the arm is the same as heretofore recited. Soldier's nephew testifies to the disabled condition of the arm in 1871, at which date he commenced to learn the molder's trade from soldier, but states that he knows the arm was in the same condition a considerable time before then. He can not fix the exact date when he first knew it. This affiant was about 9 years of age at soldier's discharge.

The manager of the iron and steel foundry of the Johnson Company, at Johnstown, Pa., testifies that he worked with soldier in the Cambria Iron Company from 1853 up to the time of soldier's enlistment; that soldier returned from the war in 1864, and that they went to work together again, immediately after discharge, and that his arm was crippled at that time. He further states that the bones appeared to have been broken and the arm improperly set, the injury being between the elbow and wrist. He also testifies to the continued disability. Another fellow-workman testifies to the crippled condition of the arm, which he first saw in 1865, and corroborates all of the other affiants as to continuance, and as to the nature of the disability. A fellow-comrade in a previous service testifies to the soundness of soldier in his second service, further stating that he saw him in the fall of 1864, and that he then had a crippled arm. His description of the disability is the same as that given by all the witnesses. The foregoing is practically all there is to the case. It should be mentioned, however, that nearly all the above-quoted affiants state that soldier told them that he had sustained his injury, while in the cavalry service, by being thrown from his horse, and that prior soundness is not questioned.

In summing up this evidence I arrive at the following conclusions, viz: Soldier was sound at enlistment. He is shown to certainly have had a crippled arm at discharge, and the arm remained in the same condition up to the date of the filing of his first declaration, and such condition continued up to death. The absence of any record is fully accounted for, and while there is no testimony of eyewitnesses as to actual incurrence, yet there is good testimony as to his disabled condition immediately after the alleged incurrence, and there is no valid or cogent suspicion raised by the history of the case that the alleged injury was the result of any act outside the line of duty. He was dis-

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charged within a month after the alleged incurrence, and the evidence shows, as stated, that his arm was certainly crippled at discharge.

The first medical examination, held on April 5, 1882, shows—

Fracture of the humerus, left; there is partial anchylosis at elbow. He can not fully extend his arm, nor can he put his hand to his mouth.

It is a rule of law in pension cases that when prior soundness is shown, and a reasonable degree of proof had that the injury was sustained in the service as alleged, there being no circumstances which would raise a suspicion that it was incurred outside the line of duty, and said injury is shown to have existed at discharge, it will be presumed that the injury was incurred in line of duty. This rule appears to have been followed by the Department—it is a sound one—and careful investigation fails to disclose any decision entertaining a contrary view. See Reuben Moyer (13 P. D., o. s., 577); Peter N. F. Von Ottendorf (3 P. D., 341).

Now, in applying this rule of law to the facts in evidence, it is seen that prior soundness has been shown. There is a good degree of proof that the injury was sustained as alleged, and there is not the shadow of a suspicion raised by any of the evidence, or by the history of the case, that any act on soldier's part outside the line of duty contributed in the slightest manner toward the injury. It is further shown that the effects of the injury were present at discharge and continued until death.

It must therefore be concluded that service origin, in line of duty, of the alleged injury to the arm has been shown, and the rejection of the claim must be vacated and the claim admitted.

It has been suggested that soldier was guilty of laches in allowing time to elapse so that three important witnesses are now dead, from whom it was probable very reliable evidence could have been secured. If this were true there would be some force in the suggestion; but the papers in the case show that soldier, up to the date of his death, made repeated attempts to have his case adjudicated, and to be advised as to what, if any, evidence was lacking, and all without avail. Under such circumstances laches can not be attributed to him.

Motion sustained and action reversed.

CONSTRUCTION—ACT MARCH 3, 1899—RETROACTIVE LAWS—DESERTED WIFE.

CATHARINE RICHARDS *v.* JAMES J. RICHARDS.

1. To entitle the deserted wife of an invalid pensioner to receive one-half the pension of her husband under the provisions of the act of March 3, 1899, it must appear that she has been deserted by said pensioner for a period of over six months subsequent to the date of the passage of said act, said act being wholly prospective and not retroactive in its operation and character. (See case of Mary Ann Rothery *v.* Henry N. Rothery (11 P. D., 77).

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2. The application of Catharine Richards under the act of March 3, 1899, for one-half the pension of this appellant, James J. Richards, having been filed in the Pension Bureau on April 15, 1899, less than six months from the date of the passage of said act, was premature, ineffective, and void, no legal rights whatever having accrued to her on said date under the provisions of said act.

(*Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 15, 1900.*)

James J. Richards, late private, Company G, Seventeenth Pennsylvania Volunteer Cavalry, is a pensioner under the provisions of the general pension law, certificate No. 281830, at the rate of $17 per month, for rheumatism and resulting disease of heart and varicose veins of right leg.

Catharine Richards filed in the Pension Bureau on April 15, 1899, an application, under the provisions of the first proviso of the act of March 3, 1899, for one-half of the pension of said pensioner, alleging that she was his lawful wife, a woman of good moral character and in necessitous circumstances, and that she had been deserted by said pensioner for a period of over six months.

After due notice to said pensioner of said application, and consideration of the evidence filed in the case by both parties, said application was, on May 7, 1900, approved for admission, and one-half the pension of said pensioner was ordered and directed to be paid to said Catharine Richards.

From this action appeal was taken by said pensioner on May 24, 1900.

The provisions of the act of March 3, 1899, under which this application for one-half the pension of said pensioner was made, and which are applicable thereto, are contained in the first proviso of said act, and are as follows:

That in case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, * * * the Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife.

The question whether the foregoing provisions of the act of March 3, 1899, were to be construed as having a retroactive signification and as authorizing the depriving the pensioner of one-half of his pension and the payment of the same to the wife upon proof of a desertion of the wife by the pensioner for a period of over six months at any time prior to the date of the passage of said act, or whether they were strictly prospective in character and operation and referred only to such desertion subsequent to said date, was most carefully and exhaustively considered and discussed in a recent decision of this Department in the case of Mary Ann Rothery *v.* Henry N. Rothery (11 P. D., 77).

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wherein it was expressly held and decided that the provisions of said act were wholly prospective, and not retroactive in character and operation, and the desertion which would authorize the payment of one-half the pension to the wife under said provisions must be shown to be the desertion of the wife by the pensioner for a period of over six months subsequent to the date of the passage of said act.

Since in the present case the application of Catharine Richards was filed in the Pension Bureau on April 15, 1899, but forty-three days after the passage of the act of March 3, 1899, it is obvious that the conditions entitling her to relief did not exist, and that no legal rights whatever had accrued to her under the provisions of said act at the date of filing said application. Sufficient time had not elapsed to make it possible for her to prove the desertion named in the act, which is the sole and only basis of her right to receive one-half the pension of the pensioner under its provisions, and consequently she had no standing whatever before the law at the time of filing said application. Said application was therefore premature, ineffective, and void, and should have been dismissed without further consideration, and the adjudication and allowance of the claim of said Catharine thereunder was manifestly erroneous and improper.

The action from which this appeal was taken is accordingly hereby reversed and set aside, and you are directed to restore to the pensioner the one-half of his pension of which he has been deprived, and which has been paid to said Catharine by virtue of said action and the orders and directions made in pursuance thereof.

It may be incidentally remarked, with reference to its bearing upon any future controversy between these parties on this subject, that it does not appear, from an examination of the papers in this case, that a case of desertion of said Catharine by the pensioner has been made out or that such desertion for a period of over six months, or any other period, has been established at any time. On the contrary, the preponderance of the evidence not only strongly indicates that said Catharine is not a woman of good moral character, but clearly and distinctly shows that she drove the pensioner away from his home and refused to live with him, and has since repeatedly declined and refused to return and live with the pensioner as his wife when solicited by him so to do. These facts would indicate that the pensioner never deserted his wife, but that she deserted him, and would clearly not entitle the wife to receive the benefits of the act of March 3, 1899, even if it were proper to consider this case on its merits. The proper legal signification of the term "desertion," as used in the act of March 3, 1899, and the facts necessary to be established to constitute a desertion of the wife by the pensioner which would entitle her to receive one-half the pension of her husband under the provisions of said act, were very clearly stated and thoroughly discussed in the decision of the Depart-

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ment above cited, and the views and conclusions therein expressed should control in the adjudication of any future claim by said Catharine for a division of the pension of the pensioner under the provisions of said act.

DECLARATION—SUFFICIENCY—AMENDMENTS.

ALPHONSO W. ELLIS.

A declaration in a pension claim, aside from its formal parts, is not invalid if it substantially sets forth the facts upon which the claim is based. It is sufficiently certain if it can be made certain. Because it is subject to amendment to make more definite and certain, it is not, thereby, invalid.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 29, 1900.

Alphonso W. Ellis, formerly a private in Company C, Twenty-third Maine Volunteer Infantry, filed his declaration under the general law on June 26, 1879, claim being rejected on June 28, 1898 (the second time), on the ground that alleged hernia was not incurred in the service. A motion had been made before the Commissioner of Pensions to the effect that the terms of the declaration were sufficient to cover injury to the spermatic cord and testicles, and although said motion was not passed upon by the Commissioner of Pensions, an appeal was filed on August 18, 1898, covering the issue raised by the said motion. The papers were returned to the Commissioner of Pensions under departmental decision of August 14, 1900, with instructions to dispose of the motion, and they have been returned with a recorded action, taken September 7, 1900, that the declaration of 1879 is not broad enough to cover an allegation of injury to spermatic cord and testicles.

The issue in this case is wholly as to the scope of the declaration filed on June 26, 1879, which declaration alleges:

That while a member of the organization aforesaid, and in the service and line of his duty, near Edwards Ferry, in the State of Maryland, on or about the —— day of December, 1862, while in a wagon, he was thrown therefrom, striking on one of the wheels, caused by a wheel sticking into a hole, resulting in rupture of the right side or groin.

His personal affidavits reiterate, practically, the above statements, in which he describes his injury as "rupture."

This case was before the Department on October 20, 1894, and in an opinion promulgated on said date it was shown that a veritable hernia did not exist until 1892, but in said opinion it is also said that—

There is sufficient evidence to show that an injury was incurred by claimant substantially in the manner alleged by him, but the best evidence indicates that the only result of the same was an enlargement of the spermatic cord and a swelling of the right testicle.

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It is not necessary to discuss this last point at length, for it goes to the merits of the case and not to the scope of the declaration. The quoted part is inserted in this opinion, however, in order to show that claimant has endeavored to establish his case by proving an injury to have been incurred. In support of such statement in the aforesaid departmental decision, it is noted that there is some little evidence tending to show that, notwithstanding claimant was told by well-informed parties that the injury received in the service did not result in a rupture—which is the term used in common parlance to designate a hernia—yet he has always insisted upon referring to the injury as having produced a rupture.

In this connection it is observed, in pension cases, that many soldiers as well as civilians, often embracing men who are more than ordinarily intelligent and well informed, do not have a correct idea of the technical meaning of the term "rupture." While a protrusion of the viscera is necessary to constitute a veritable hernia, yet an injury to the abdomen which does not involve the protrusion of the viscera is often referred to by those other than members of the medical profession as a "rupture," a "hernia," or "breach," when the structure of the parts is affected. Such has been the case in the testimony in the within claim.

It is not necessary to enter into a detailed explanation of the anatomy of the abdominal walls or the viscera, it being sufficient to state that the apparent confusion in the use of terms in describing the results of an injury to the abdomen is not strange, in view of the close relation that the spermatic cord and testicles have to the abdominal walls.

The gist of the declaration in question is an injury to the right groin; the result of this injury was claimed to be a rupture, and the true question is: Did the alleged injury of the abdomen, or right groin, or right side, result in a pensionable disability?

The declaration in a pension claim bears a corresponding relation to its case as does the declaration or complaint in a case at law. Such a declaration is good if it substantially sets forth the cause of action in such terms that an issue can be joined, and is sufficiently certain if it can be made certain.

The declaration in the within case is similar to one in a case at law, in which a motion would lie to make the allegations more definite and certain. It is not one which would be open to demurrer, or which would be stricken out for want of exactness, neither is it one which could be successfully demurred to during trial, because the proof, such as has been referred to herein, did not correspond to the allegations.

The true mission of a declaration, whether it be in a case at law or in a pension claim, is that it should state the facts which are the basis of the claim in such language and with such definiteness and clearness

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that the party against whom the claim is filed be apprised of the demand in terms which may not be mistaken, misinterpreted, or confused.

In the claim under consideration the soldier herein has filed a claim against the Government, the basis of which is an injury. He has set forth the cause which led up to the injury in unmistakable terms. That he states he was "ruptured" by reason of the injury is of little moment. The injury is the cardinal point of the declaration, aside from the statutory parts, while the precise disability arising or resulting from said injury, and the parts affected, are matters of proof and not necessarily of allegation. Sufficient facts are set forth under which issue can be joined without the Government being taken by surprise, and enough documents have been filed to practically amend the declaration making an injury to the spermatic cord and testicles the basis of the claim. Any intention to express an opinion upon any phase of the merits of the case is disavowed.

Action reversed.

PRACTICE—REOPENING—LIMITATION—ORDER 192.

WILLIAM W. WILDS.

The certificate of medical examination made under the claim for increase does not show a degree of disability due to pensioned causes that is equivalent to the loss of a hand or a foot for manual labor, which must be shown before the appellant can receive the next higher rate of pension. As the evidence referred to by the appellant was not filed within ninety days after the letter of rejection had been mailed, the action of the Bureau in refusing to reopen the rejected claim was proper and in accordance with the rules of practice. Actions affirmed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, September 29, 1900.

This appellant, William W. Wilds, late second lieutenant Company K, Tenth Indiana Volunteer Infantry, is pensioned under the general law at $17 per month, by certificate No. 177864, for dyspepsia and rheumatism. He applied for an increase of pension on November 14, 1892, but his claim was rejected on May 2, 1895, because no increase of disability had been found on medical examination. On January 5, 1899, he filed some affidavits, medical and lay, to reopen his rejected claim; but the Bureau declined to do so, because the evidence was not filed until after ninety days had elapsed since the letter of rejection had been sent to the claimant.

On June 2, 1900, the pensioner filed an appeal from both of these actions, and stated that he fully believed that the certificate of medical examination made under his claim showed that his disability had increased and that he was entitled to a higher rate than that which he

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now receives, and alleged that the Bureau had erred in refusing to reopen his claim for increase because the evidence filed to reopen it had not been filed within ninety days after the mailing of the notice of rejection, and added that—

> If I understand the rulings of the Secretary of the Interior, a rejected claim may be called from the rejected files at any time by manifesting a desire to complete it and filing material evidence, and that when these conditions are complied with there is no limitation of time.

This latter statement of the appellant is correct so far as reopening rejected original claims is concerned; but on February 24, 1893, the Commissioner of Pensions issued Order No. 192, in which it was ordered that—

> Applications for the reopening of increase claims and the filing of evidence thereunder shall be limited to ninety days after the date of mailing of the letter of rejection. If the application, with evidence in such cases, is not made within the ninety days, as aforesaid, the rejection shall be considered final, and if the party desires to prosecute a claim for increase of his pension it will be necessary for him to file the regular application.

In the Treatise on the Practice of the Pension Bureau, which was approved by the Secretary of the Interior on April 9, 1898, this order is quoted in paragraph 3 on page 122, and as part of the regulations of the Bureau. The reason for this order is manifest, when it is considered that a pensioner's disability may have greatly increased after the date of the certificate of medical examination upon which his claim for increase was rejected, and that as said action of rejection was proper at the time it was taken it should not be reversed and reopened because a different condition of affairs may exist ninety days or more after the claimant had been informed that his claim had been rejected. Under a different practice a claim for increase might never be considered as settled until it had been allowed.

The certificate of medical examination on which the rejection of appellant's claim for increase was denied was made by a board of surgeons on May 10, 1893, which stated that he was 53 years old, was 5 feet 8½ inches in height, and weighed 195 pounds, and had a pulse rate of 105, with 22 respirations per minute. His temperature was stated to be 99½, which would seem to indicate a feverish condition of his system which was not due to pensioned causes, for the description given by the board does not show that he was suffering from any exacerbation at the time of his examination. This condition would also produce an increase in the pulse rate and respiration.

The board stated further that the tongue was furred and red, his skin was moist and clean, and the body was well nourished; that the stomach was very full, well outlined, and very tender.

The objective signs of rheumatism were 1 inch atrophy of right hip, thigh, and knee, crepitation in knee joints, a swelling of the left elbow

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so that it was three-fourths inch larger than the right, a swelling of the left wrist so that it was one-half inch larger than its fellow, and crepitation in both elbows and shoulder joints.

No organic disease of the heart was found, but its action was stated to be irregular and intermittent and its rate was increased to 110 on standing. All other organs were said to be normal. The board stated that they did not consider that the pensioner's disability was equivalent to the loss of a hand or a foot for manual labor.

The appellant is now in receipt of a pension of $17 per month, and before he can be given the next higher rate it must be shown that his disability is equivalent to the loss of a hand or a foot for the purposes of manual labor, which clearly has not been done.

The evidence filed refers to his physical condition subsequent to the date of the examinations quoted, and hence is of no value in determining his condition in 1893.

After careful consideration of the facts in the case, it is believed that the actions of the Bureau in denial of increase and in refusal to reopen the claim for increase, upon evidence, which had been filed more than ninety days after the rejection of the claim, were correct and in accordance with the facts in the case and the practice of the Department.

These actions are therefore affirmed.

MARRIAGE AND DIVORCE—IMPEDIMENT—KANSAS.

ELIZABETH LOCKWOOD (WIDOW).

The deceased soldier married the appellant by ceremony in the State of Kansas in 1875, at a time when he had a former wife living, who subsequently obtained a divorce from him in the State of Michigan in 1877, which facts were unknown to the appellant during the lifetime of the soldier. The appellant and the soldier lived together continuously as husband and wife in the State of Kansas, united in church membership as husband and wife, joined in the execution of deeds and conveyances as husband and wife, and were so recognized by their relatives, friends, and neighbors from and after the removal of the impediment to their marriage in 1877 up to the date of the soldier's death in 1898, a period of twenty-one years.

Held, That under the laws of the State of Kansas, where the parties resided, a valid common-law marriage will be presumed to have been contracted by them after the removal of the impediment to their lawful union.

(State *v.* Walker, 36 Kan., 297; State *v.* Hughes, 35 Kan., 626; State *v.* McFarland, 38 Kan., 664; Matney *v.* Linn, 59 Kan., 613; and Shorten *v.* Judd, 60 Kan., 73.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 8, 1900.

Elizabeth Lockwood filed in the Pension Bureau on January 26, 1899, an application for pension under the provisions of the third section of

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the act of June 27, 1890, as widow of Edgar N. Lockwood (deceased), late private, Company A, Sixth Michigan Volunteer Cavalry, alleging a service by said soldier in said organization of ninety days and more during the war of the rebellion, an honorable discharge from said service, and his death on November 7, 1898, leaving her without other means of support than her daily labor.

Said application was rejected on December 15, 1899, upon the ground that the claimant had never been lawfully married to the deceased soldier and was not his widow, he having had a living and undivorced wife at the time of her marriage to him in 1875.

From said action appeal was taken on March 5, 1900.

The facts material to the action taken and the issue presented by the appeal in this case, are clearly shown by the evidence, are few and undisputed.

The soldier and the appellant were duly married in the State of Kansas by license and ceremony, as required by the laws of that State, on September 12, 1875, and lived together continuously in that State as husband and wife from that date until the soldier's death, which is shown to have occurred upon the date alleged, November 7, 1898, three children having been born to the appellant as the issue of said marriage. During this period the evidence shows that the soldier and appellant at all times publicly acknowledged and recognized each other as husband and wife, and were so recognized and acknowledged by their relatives, friends, and neighbors, and by all with whom they came in contact. They united in church membership as husband and wife, and were so recognized in their church relations during all the time of their association together, and it is shown by the public records of deeds that they at various times united as husband and wife in the execution of deeds and conveyances conveying and mortgaging real estate.

It furthermore appears from the evidence that at the date of the soldier's marriage to the appellant he had a wife living and undivorced, to whom he had been lawfully married in the State of Michigan, and who subsequently obtained a divorce from him, on the ground of desertion and failure to support, in the circuit court of Kalamazoo County, Michigan, on July 2, 1877, about two years after his marriage to the appellant, as appears from a duly certified and authenticated transcript of the decree of said court.

It is asserted by the appellant, and in this she seems to be fully corroborated by the evidence, that although she knew that the soldier had been previously married she was informed by him before she married him that he had been divorced from his first wife, and that she so believed at the time of her marriage and during all the time that she lived with the soldier as his wife, and never learned to the contrary until after his death and after she had applied for pension as his widow, when, on being called upon by the Pension Bureau to furnish proof of

the dissolution of the first marriage of the soldier, she obtained a copy of the decree of divorce from the office of the clerk of the court in the State of Michigan in which it had been rendered, and then for the first time became aware that said divorce had been granted nearly two years after her marriage to the soldier.

That the marriage of the soldier and the appellant in 1875 was, under these circumstances and under the laws of Kansas, absolutely null and void, and had no force and validity whatever and created no legal bond of matrimony between the soldier and the appellant can not be questioned. In the case of Fuller *v.* Fuller (33 Kansas, 582) the supreme court of Kansas states:

> That a marriage where one of the parties at the time has a husband or wife living is void, absolutely and in all its aspects, we suppose no one will question. It requires no judgment of divorce or of nullity to render it void. It is void inherently and from the beginning.

It is not contended, however, in this appeal that the ceremonial marriage of the soldier and the appellant was good in law or that it had any force and validity, nor does the appellant base her claim to recognition as the widow of said soldier upon said ceremonial marriage, but it is urged that a valid common law or consensual marriage should be presumed to have been contracted between the soldier and the appellant subsequent to the removal of the legal impediment to their lawful wedlock by the divorce of the first wife from their continuous cohabitation as husband and wife, and their public acknowledgment of each other as such, and their universal recognition as husband and wife by the community in which they lived during the whole period of about twenty-one years that elapsed between the removal of said impediment in 1877 and the death of the soldier in 1898.

This case is very similar to, and almost identical as to the facts presented by the evidence with, the cases of Margaret L. Thomas (9 P. D., 139) and Fredricka Kent (10 P. D., 211). In the first of said cases it was decided by this Department that a valid common-law marriage would be presumed, after the removal of a legal impediment to lawful matrimony, from the continuous cohabitation of the parties under circumstances exactly similar to those existing in the present case, under the laws and the decisions of the courts in the State of Michigan, where the parties in that case resided during the cohabitation; and in the latter case it was decided that a valid common-law marriage would be presumed in the State of Ohio under similar circumstances.

In the case of Fredricka Kent (supra) the general scope of the decisions of the courts of the different States of the Union relative to a common-law marriage arising upon the removal of a preexisting impediment to lawful matrimony was well stated, as follows:

> As to a common-law marriage arising upon the removal of a preexisting impediment, it can not be successfully denied but that the appellate courts in different States are not in unison in their opinions upon a given state of facts, but it is evident

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that the general scope of the decisions upon this point are plainly divisible into two classes: First, those which compel a showing that a new relation has been entered into after the removal of the impediment, such relation to be established upon evidence proving that the parties were aware of the removal of the impediment, and that they thereafter practically agreed to a new contract; second, those which allow a presumption of a new contract to obtain by reason of such conditions as would prove a common-law marriage. The decisions in both classes are founded upon the establishment of a common-law marriage, but one class relies upon proof that a new relation has been actually entered into as a fact, while the other class rests upon a presumption of such fact. The line between these two classes is a broad one, and it is as clearly discernible as that which separates a proof of actual death and those facts upon which a presumption of death rests, or as between something proved by direct or something proved by circumstantial evidence.

The appellant and the deceased soldier having resided during the whole period of their cohabitation as husband and wife in the State of Kansas, her marriage to the soldier must be proved, under the requirements of the second section of the act of August 7, 1882, to have been a legal marriage in accordance with the laws of that State. Hence it is only necessary to consider under which of the above-enumerated classes of decisions those of the supreme court of Kansas on this subject belong, since it is obvious that if they belong to the second class a common-law marriage between the appellant and the deceased soldier will be presumed to have taken place subsequent to the removal of the impediment to their lawful union from their cohabitation and recognition as husband and wife under the circumstances shown by the evidence, which would be a valid and legal marriage under the laws of that State, and entitle this appellant to recognition as the pensionable widow of the soldier.

Marriage at common law is recognized as legal and valid in the State of Kansas. In the case of the State *v.* Walker (36Kansas, 297) the supreme court of Kansas declared the law of that State on this subject to be as follows:

> The mutual present assent to immediate marriage by persons capable of assuming that relation is sufficient to constitute marriage at common law; and such a marriage will be sustained in this State when its validity is directly drawn in question.

And in the same case the court further stated, relative to the proof necessary to establish the existence of such a marriage, as follows:

> When persons who are permitted to marry "live together as man and wife" it may be taken as an expression of consent, and consent under these circumstances is sufficient, as we have seen, to constitute a marriage at common law.

The same doctrine was also announced in the cases of State *v.* Hughes (35 Kansas, 626), and State *v.* McFarland (38 Kansas, 664); and in the late case of Matney *v.* Linn (59 Kansas, 613), which was a case where the parties commenced to live together as husband and wife without any formal marriage ceremony, and at a time when an impediment to lawful matrimony existed, and continued such cohabitation after such

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impediment was removed and until the death of one of them, the court said:

> The fact that * * * there was no formal marriage at that time does not argue that they did not again enter the marriage relation. It appears that there was at that time a mutual present assent of the parties to immediate marriage. They became capable of lawfully assuming that relation, and in pursuance of that consent and agreement they lived together as husband and wife in good faith until they were separated by death. These things were sufficient to constitute a valid consensual marriage.

The foregoing ruling was sustained and cited with approval by the court in the still more recent case of Shorten *v.* Judd (60 Kansas, 73 and 277).

But one conclusion is possible from the foregoing, and that is that the Kansas courts hold that a valid common-law or consensual marriage will be presumed, after the removal of an impediment that invalidated a former marriage between the same parties, from the cohabitation and recognition of said parties as husband and wife under circumstances indicating a matrimonial intent.

In the present case every element of a valid common-law marriage is presented by the established and admitted facts as hereinbefore stated, and, in accordance with the decisions cited, it must be held that under the laws of the State of Kansas a valid common-law marriage is presumed to have been consummated between the appellant and the deceased soldier from and after the removal, in 1877, of the legal impediment to their lawful wedlock which invalidated their attempted marriage by ceremony in 1875.

The appellant having proved her marriage to the deceased soldier to be a legal marriage according to the laws of the place where they resided at the time said marriage occurred, and where she resided when her right to pension accrued, in accordance with the provisions and requirements of the second section of the act of August 7, 1882, she was the lawful wife of said soldier, and when she filed her application for pension herein she was his widow, and should have been accepted and recognized as such for pensionable purposes.

The rejection of this claim upon the ground stated was, therefore, error, and is hereby set aside and reversed, and you are directed to cause the same to be reopened and adjudicated upon its merits, recognizing and accepting the appellant as the widow of the deceased soldier.

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EVIDENCE—BURDEN OF PROOF—PRESUMPTIONS—MARRIAGE.

AUGUSTA M. KOSCHWITZ (WIDOW).

There being nothing whatever in the evidence tending to show this soldier was ever married prior to his formal marriage to claimant in 1886, at which time he was 66 years of age, and the testimony showing that from the time of his discharge from service in 1864 until such marriage he was always considered a single man, her marriage to the soldier must be presumed to have been valid, and the burden of proof of its invalidity is upon the Government.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 12, 1900.

This appellant, Augusta M. Koschwitz, on April 25, 1894, filed a claim, No. 594607, for pension, under the Revised Statutes, as the widow of Ernst Koschwitz, who was a member, from July 10, 1861, to July 23, 1864, of Company C, Twenty-eighth Ohio Infantry, and died January 18, 1894.

Said claim was rejected in July, 1898, on the ground of—

Claimant's declared inability to prove that soldier had not been previously married (he being 66 years of age at date of her marriage to him) and hence that she is his legal widow.

On August 31, 1898, she, through her attorneys, appealed, contending that the rejection is indefinite, that she has proved her marriage to the soldier, that no reason why it should be considered invalid is known, and that it should, in fact, be presumed to be valid until the contrary is proved.

The rejection of this claim is clearly erroneous on the facts. There is not the slightest evidence in the case, nor any reason for suspicion, that the soldier was ever married prior to his formal marriage to claimant in California in 1886, shown by record evidence thereof. Not only this, but the minister who performed the ceremony stated in his official return that "upon due inquiry there appears to be no legal impediment to the marriage," and his return shows accordingly that soldier was "not married before" and that claimant was a divorcee from a Mr. Blind; and there is also testimony by acquaintances of the soldier covering nearly the entire period from his discharge to his death to the effect that he was always known, prior to his marriage to claimant, as a single man.

The adverse action in this case appears to have been based solely upon the fact that the soldier was 66 years of age at the time of this marriage to claimant; coupled, perhaps, with the further fact that he was a foreigner and might, possibly, have been married before he came to this country or before his enlistment in the Army, as to which periods of his life there is no evidence whatever.

There is no warrant, however, for any supposition of a prior mar-

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riage, and it is not incumbent upon a claimant, in the absence of anything whatever to indicate the invalidity of her formal marriage, to produce the negative testimony required by the Bureau of Pensions in this case. The claimant is entitled in such a case to the usual presumption in favor of the validity of such a marriage, and the party who denies its validity has the burden of proving that it was not valid. (Lizzie Yates, 10 P. D., 446.)

Although claimant was married twice before her marriage to this soldier, there appears to be no question as to her competency to contract this last marriage; the death of her first husband in 1872 and divorce of her second husband in 1880 being shown.

The rejection of this claim on the ground stated was clearly erroneous and is reversed. You will readjudicate the claim accordingly.

LINE OF DUTY—DEATH CAUSE—ACCIDENTAL FALL.

MARY E. PARKER (NOW RESDIN), WIDOW.

Soldier was killed by a fall from a window at the hotel at which he was stopping just prior to his final payment and the disbandment of his command. It is held that his death was not due to his military service in line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 12, 1900.

Mary E. Resdin, formerly Parker, filed in the Pension Bureau on October 30, 1865, an application for pension under the provisions of section 4702, Revised Statutes, as widow of Major E. Parker (deceased), late private, Company I, First New Hampshire Volunteer Heavy Artillery, alleging the death of said soldier in line of duty during his military service on June 21, 1865.

Said application for widow's pension was first rejected on June 3, 1895, upon the ground that the death of the soldier was not shown to have occurred while he was in line of duty, or to have been due to his military service.

On appeal from said action of rejection to this Department the same was affirmed on June 27, 1895, the Department holding that the soldier while absent from his command on a pass was not regarded as in line of duty, in the sense in which that term is used in the pension laws, and his death under such circumstances conferred no right or title to pension upon his widow.

Subsequently, upon the filing of new and additional evidence, said claim for widow's pension was reopened and further considered in the Pension Bureau, the consent and approval of this Department having been first had and obtained, and on January 25, 1899, it was again rejected upon the same ground upon which it had been previously rejected, and for the additional reason that the cause of the soldier's

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death was shown not to be due to, or in any way connected with, his military service.

From this last action of rejection the present appeal was taken on March 21, 1899.

The time, place, and circumstances of the soldier's death are clearly shown by the evidence, and there is no doubt or controversy concerning the material facts of the case.

The official military records of the War Department show that the deceased soldier served in the above-named organization from September 3, 1864, to June 15, 1865, upon which date he was mustered out of the service with his company at Washington City, D. C., but his regiment and company were ordered to camp at Concord, N. H., to await final payment, and were finally paid off and disbanded at that place on June 30, 1865. The records also contain the statement that the deceased soldier—

* * * was accidentally killed at Concord, N. H., on or about June 21, 1865, by falling from a window prior to final payment and disbandment of his company and regiment.

The evidence originally in the case clearly shows that the deceased soldier was, on or about June 21, 1865, absent from the station or camp of his regiment and company on a pass, or by permission of his commanding officer, and was lodging at a hotel in the town of Concord, N. H., known as the Sherman House, and that sometime during the night he arose from his bed and walked through an open window in his bedroom situated in the third story of said hotel, fell to the sidewalk beneath, and was instantly killed.

The new and additional evidence upon which the case was reopened and reconsidered in the Pension Bureau consists of an affidavit executed in November, 1898, by First Lieut. W. H. Shurtleff, of appellant's company, and who was in command of said company at the time, in which he states that upon the arrival of the regiment and company at Concord, N. H., owing to the filthy and unsanitary condition of the camp and quarters to which they were assigned and where they were stationed, he obtained permission of the officer in command of said camp for certain men of his company to be absent from the camp and quarters of the regiment at night and to lodge in the town of Concord, he pledging himself for their good behavior and undertaking that they would return and report at the company quarters in camp at the proper time each morning. He states that the deceased soldier was one of the members of his company for whom such permission was obtained, and that it was while he was absent from the camp of the regiment and the quarters of his company in pursuance of such permission, or leave of absence, that he fell from the window of the hotel in the town of Concord in which he was lodging on the night of June 21, 1865, and was killed as hereinbefore stated.

This affidavit of Lieutenant Shurtleff does not differ materially from

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previous statements made by him, and which were on file and duly considered when this case was originally adjudicated in the Pension Bureau and passed upon by this Department on the former appeal. It merely gives a more detailed and circumstantial account of the circumstances under which the soldier happened to be absent from the quarters of his company at the time he was killed, but does not change the material facts of the case in any essential particular, nor does it tend in any degree to alter the status of the case. Granting all that Lieutenant Shurtleff states, his last affidavit still shows that at the time the soldier was killed he was absent from his command by permission, or leave of absence, granted him for his personal convenience and comfort, and not by virtue of any orders from his superior officers, or in the performance of any military duty.

As clearly appears from the authorities cited in the decision on the former appeal of this case and from numerous other decisions, it has uniformly been held by this Department that disability incurred or death occurring under such circumstances could not be considered as in the line of duty, and conferred no right or title to pension whatever under the provisions of sections 4692, 4693, and 4702 of the Revised Statutes.

Aside, however, from any consideration of the question of line of duty, even if it should be conceded, for the sake of argument, that the last affidavit of Lieutenant Shurtleff shows all that is claimed for it by the appellant, and that the soldier was in the line of military duty while absent from his command under the circumstances shown by the evidence and sleeping in a hotel in the town of Concord, it is not perceived how his death could be attributed in any way to his army service, or that the appellant's claim for pension as his widow would be benefited thereby, since it clearly appears from the testimony of near relatives of the soldier, who had been intimately associated with him all his life, that he had always been a somnambulist or sleepwalker and had been accustomed to walk in his sleep from childhood.

The evidence unquestionably shows that the soldier was in a somnambulistic state when he fell from the window of the hotel. The man who occupied the same room with him at the hotel on the night he was killed testifies that—

> He went to bed sober, and in his sleep walked out of the window.

His death is, therefore, directly traceable to an abnormal psychological and physical condition or infirmity which had existed long prior to his army service, and which was neither proximately nor remotely connected therewith, and hence it could not possibly confer any right or title to pension upon this appellant as his widow under the provisions of section 4702, Revised Statutes.

Consequently the rejection of said application for widow's pension upon the grounds hereinbefore stated was manifestly without error, and is affirmed accordingly.

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DEATH CAUSE—SURGICAL OPERATION—SEQUENCE.

ELISABET KAUFMAN (WIDOW).

The soldier's death is shown to have resulted from disease of kidneys, caused by ether anæsthesia, induced for the purpose of operating on a diseased right testicle, for which not pensioned, and for the radical cure of a right inguinal hernia and hydrocele, for which pensioned.

Held, that inasmuch as the pensioned disabilities were included in the operation leading to the soldier's death, the widow is entitled to pension.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 16, 1900.

Elisabet Kaufman, widow of Gottlieb Kaufman, who served as a corporal in Company B, Third Michigan Volunteer Infantry, appeals, through her attorney, from the action of the Bureau rejecting her claim for widow's pension under the general law. The appeal was filed May 19, 1898.

Her husband was a pensioner at $30 per month on account of disability resulting from right inguinal hernia, hydrocele of right side, chronic diarrhea, dyspepsia, and total deafness of right ear and nearly total deafness of left ear. He died November 29, 1894.

The widow is now pensioned under the provisions of the act of June 27, 1890, under certificate No. 434149.

The grounds for the final rejection of the widow's claim under the general law, as shown by indorsement on the face brief, are—

* * * that the soldier's death from disease of kidneys was not the result of right inguinal hernia and resulting hydrocele, chronic diarrhea, and resulting dyspepsia, and deafness, for which pensioned, and there is no record or other satisfactory evidence of origin in service of any disability which might have caused the fatal disease.

The testimony shows that the fatal disease of the kidneys followed an operation undertaken for the removal of a diseased right testicle, and incidentally for the cure of the hydrocele and hernia. It appears to be established that the exciting cause of the disease of kidneys was the prolonged ether anæsthesia necessary for the performance of the operation.

The essential facts in the case are set out in the following report of the medical referee on the appeal:

* * * The history elicited showed that the soldier died twenty days after an operation performed for the removal of a diseased testicle and for the radical cure of the hernia and resulting hydrocele for which he was pensioned. Dr. D. E. Robinson, the attending surgeon, testified that the mode of death was through heart failure; that the immediate or prime cause was uræmic poisoning, due to acute inflammation of the kidneys, which he attributed to the effects of the ether administered during the operation; and that the contributing cause was general debility due to age and long suffering from the pensioned causes.

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Since renal inflammation is one of the rare accidents which is liable to occur after the administration of large quantities of ether (vide Park, Surgery by American Authors), it was deemed advisable before answering the appeal to have a special examination into the circumstances attending the operation, to settle a doubt as to the possible merit of the case. After this examination you state that the claim was legally rejected without reference to this division. This proves not to be the case, as the brief shows that the claim was adversely acted upon in this division on July 23, 1900, upon consideration of the special examiner's reports. Such action, however, was unusual, since the claim was in the hands of the appeal section and had not been reopened for the purpose of readjudication.

Special Examiner Hunt's report has introduced a new element in the case, in the form of a public record which attributes death to peritonitis. The record fails to state by whom the death was reported, and the special examiner did not determine that point. Dr. Robinson insists that this record is an error; and he gives a consistent history of acute renal inflammation developing immediately after the operation and rapidly progressing to a fatal termination through uræmic poisoning. The other surgeons and the nurse who were present at the operation could give no information of value as to the subsequent course of the case. An autopsy was not made. The records of the hospital are incomplete and afford no information of a character to assist in the adjudication of the claim. The only evidence which differs in any essential point from that of Dr. Robinson, beside the record of death, is that of the claimant herself; and her testimony does not negative his statement as to the death cause.

The evidence elicited tends to show that the kidneys were normal prior to the operation; and, admitting that to be the case, it is not deemed very material whether the record or the attending surgeon correctly states the cause of death, since the evidence clearly indicates, in my opinion, that the soldier's death was a remote effect of the operation; and both peritonitis and renal inflammation are accidents to which he was liable as a result.

Taking this view of the case, the questions remaining for consideration are the necessity for the operation and whether the pensioned causes were controlling factors.

The attending physician insists that the operation was a necessity, and had to be performed, as the soldier's condition demanded it; and that its primary object was as much for the radical cure of the hernia and hydrocele as it was for the removal of the diseased testicle; that one could not be done without the other, as the hernial sac was low and there were adhesions. A careful analysis of the case, however, does not warrant so strong a statement as to the influence of the pensioned causes; in fact, the surgeon himself admitted that "the testicle bothered him the most," and he added that it "was tubercular, and was beginning to break down, and had to be removed whether he wanted or not."

The evidence shows that the hernia, at the time of the operation, was not strangulated; and there was no reason from the condition of the hernia itself, so far as shown, why an operation for its radical cure should have been undertaken, even if it was admissible, in view of the fact that the hernia was of thirty years' duration and that the soldier was over 60 years of age and debilitated. Nor under such circumstances would an operation for the cure of the hydrocele of the cord, involving also the radical cure of the hernia, have been justified, in my opinion, independent of the existence of the disease of testicle.

Considering the testimony of the claimant, showing that the soldier was suffering from excruciating pain prior to the operation, in connection with that of the attending surgeon and the other evidence in the case, and taking into account the nature of the disability and the rules of surgical practice applicable to the matter, it is clearly evident that the primary object of the operation was, first, the relief of the pain due

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to the diseased testicle; and, second, the removal of an organ which was considered to be a menace to life. The extension of the operation to include the radical cure of the hydrocele of the cord which had been admitted as a result of the hernia—but with doubtful propriety—was necessary, if at all, because it was a tubercular lesion, and consequently would menace life by furnishing a focus from which constitutional invasion was likely to take place. Therefore, if the disease of testicle and cord were tubercular, neither were related to the hernia, and the necessity for the operation was purely independent of and apart from any disability of service origin. If, on the other hand, the hydrocele of the cord was simple, and was really a result of the hernia, as from the improper application of a truss, its radical cure, as well as that of the hernia, was a matter of expediency and not one of necessity.

We do not concur with the statement of the attending surgeon that the diseased testicle could not be removed without performing a radical operation for the cure of the hernia. No reason is shown why he could not have broken down the adhesions of which he speaks without opening the hernial sac. Having the soldier under the influence of an anæsthetic and having undertaken an operation in the region of the hernia, it was a favorable opportunity to also perform an operation for the radical cure of the latter. But it certainly was not necessary that it should be done; and it was probably the prolongation of the operation to include the hernia which was responsible for the rare accident—due to poisoning from the anæsthetic—which resulted in the soldier's death.

Regarding the nature and risks of the operation it may be briefly stated that the simple extirpation of a diseased testicle is not a serious operation and is attended with but slight risk to life. But when it is necessary to extend the operation to the inguinal canal it becomes a far more serious matter, and if this necessity is known beforehand the operation is of doubtful propriety as a dernier resort. In speaking of castration Agnew says: "Indeed, when the cord within the canal is involved, the propriety of *any* operation is exceedingly questionable." Formerly early extirpation of the testicle was advised by authors in case of tubercular disease of the gland, to prevent extension of the disease and general infection. Having usually proved futile in this respect, the operation is now done less frequently for this cause and is only advised under exceptional circumstances (Park).

It is evident, then, that the operation was one involving considerable risk. The case appears to have been one belonging to the class which forms the exception to the rule and an operation for the removal of the testicle seems to have been demanded. But in view of the increased risks and the age and general condition of the soldier, there is ground for grave doubt whether the surgeon was justified in extending it to include the radical cure of the hernia, which was an operation of expediency and not of necessity. Nevertheless the operation itself appears to have been successful and the death to have been due to one of those rare accidents which could not be foreseen, but which probably would have been avoided had he chosen the simple operation of removing the diseased gland without attempting the radical cure of the hernia. Having, however, chosen the latter and death having resulted, it is not believed that the fatal result can fairly be attributed to the pensioned causes, the operation for the hernia not being a matter of necessity and its existence being a contraindication rather than an additional reason for undertaking the primary operation, under all the circumstances.

The disease of testicle for which the operation was primarily performed was first alleged and shown in 1888. The board that examined the soldier on November 28, 1888, described the disability as a tumor in the right scrotum 10 inches in circumference, extending 6 inches below the upper margin of the pubic bone and consisting of an enlarged testicle, apparently "fibrous degeneration," and an enlargement of the cord, probably hydrocele, *which was readily separated from the tumor below.* Dr. Robinson's diagnosis was tuberculous inflammation of the gland. Since no microscopic

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examination was made, and as such cases are often difficult and sometimes impossible to differentiate without such examination, the question as to the form of inflammation is open to doubt. But whether there was simple fibroid enlargement with subsequent degeneration or tubercular inflammation of the gland, it is safe to say that it had no connection with the pensioned causes, a conclusion which is in consonance with that of the attending surgeon.

From a medical standpoint the case may be summarized as follows:

1. The soldier's death was the remote effect of an operation, being due to an unavoidable accident incident thereto.

2. The operation was performed primarily for the relief of a nonpensioned disability; incidentally, for the radical cure of a pensioned disability.

3. It involved grave risks, but was deemed necessary to prolong life, and the risk was therefore properly assumed by the soldier.

4. The operation was not essential on account of the pensioned causes alone. Its extension to include them added to its gravity and probably determined the fatal result, but so far as his life was concerned it was wholly unnecessary that they should have been included in the operation, that being done merely as a matter of expediency, and the Government is not responsible for the outcome.

In my opinion the adverse action was proper, and it is adhered to.

It thus appears the widow's title to pension is denied because the surgical operation leading to the death of her husband was not deemed by the medical referee as essential on account of the pensioned causes alone; that the inclusion of the hernia and varicocele in the operation was wholly unnecessary, so far as his life was concerned, and that the operation was extended merely as a matter of expediency.

The medical referee states that there was no reason, from the condition of the hernia itself, so far as known, why an operation for its radical cure should have been undertaken, even if it was admissible, in view of the fact that the hernia was of thirty years' duration and that the soldier was over 60 years of age and debilitated; nor under these circumstances would an operation for the cure of the hydrocele of the cord involving the radical cure of the hernia have been justified, independent of the testicle.

The question here arises, Who is the most competent to pass upon the necessity for the operation as performed, the surgeon doing the operation or the medical referee?

The surgeon is reported by the special examiner "as a graduate, has a large practice, and stands well professionally and socially." There is nothing in the evidence to show that he was not skillful, or that he was guilty of malpractice in the case. The welfare of his patient appears to have been his sole consideration.

He stated to the special examiner that he could not effect the removal of the diseased testicle, the necessity for which there can be no doubt, "without operating on the other conditions," meaning the hydrocele and the hernia.

The testicle was tubercular, was of large size, weighing about 2 pounds; the hernia was adherent, and the hydrocele was large and required tapping about every twenty days, when from 15 to 20 ounces

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of fluid were evacuated. These conditions appear to have been, in the judgment of the surgeon, such as to warrant or make necessary the operation as done by him. Furthermore, the surgeon stated that the primary object of the operation was as much for the radical cure of the hernia and the hydrocele as it was for the removal of the diseased testicle.

The referee says he can not concur with the statement of the attending surgeon that the diseased testicle could not be removed without performing a radical operation for the cure of the hernia; that no reason is shown why he could not have broken down the adhesions without opening the hernial sac.

When such a condition of the scrotal sac existed as is shown by the testimony it scarcely seems necessary for the surgeon to have explained why he could not have broken down the adhesions.

A hydrocele containing 20 ounces of fluid, which had been subjected to tapping every twenty days, and a hernia in the scrotum bound down by adhesions, seems clearly to indicate the necessity for extending the operation, and the surgeon, having the parts exposed before him, was certainly in the best position to determine the proper procedure.

Furthermore, t is pensioner had undoubtedly the right, and it was his duty, to seek surgical relief for the hydrocele and the hernia, even if he had not been afflicted with the diseased testicle, and had he done so, and the operation determined upon as the best by the surgeon in charge of the case had proved fatal, his widow would have been entitled to pension.

This case comes within the rule laid down in the case of Mary E. Dolan (11 P. D., 62), wherein it was held that—

When it is shown that disability of service origin was an important controlling factor in the cause of death, as well as being so complicated with the other causes that its influence can not be separated from the other causes, or the precise degree of materialness of each factor in death is not susceptible of determination, then the disability of service origin may be legally accepted as the cause of death.

For the reasons stated the action appealed from is reversed.

SERVICE—MEXICAN WAR—ACT JANUARY 29, 1900.

MATILDA I. KENNEDY (WIDOW).

It appearing from the evidence that the deceased sailor did not serve for sixty days with the Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto in the war with that nation, this appellant is not entitled to pension as his widow under the provisions of the act of January 29, 1887.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. October 16, 1900.

Matilda I. Kennedy filed in the Pension Bureau on July 12, 1899, an application for pension under the provisions of the act of January 29, 1887, as widow of John Kennedy (deceased), late seaman, United

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States Navy, alleging that said sailor had served for sixty days with the Navy of the United States on the coasts or frontier of Mexico and en route thereto during the war with that nation, had been honorably discharged from said service, and had died on June 9, 1899, leaving her as his widow surviving.

Said application for widow's pension was rejected on May 23, 1900, upon the ground that it appeared from the evidence that the deceased soldier did not serve for sixty days upon the coasts or frontier of Mexico, or en route thereto, during the war with that nation as alleged, and as is required by the provisions of the act of January 29, 1887, to entitle the claimant to pension thereunder as his widow.

From said action appeal was taken on September 10, 1900.

The act of January 29, 1887, provides a pension for the surviving widows of such officers and enlisted men, including marines, militia, and volunteers of the military and naval services of the United States, who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and such other officers, soldiers, and sailors as may have been personally named in any resolution of Congress for any specific service in said war.

In the present case the claim of the appellant for pension under the provisions of said act is based upon the allegation that the deceased sailor served for sixty days en route to and on the coasts and frontier of Mexico during the war with that nation.

The official record of the deceased sailor's service in the United States Navy shows that he enlisted therein on November 4, 1847, and served on board the U. S. S. *North Carolina* as an ordinary seaman until April 10, 1848, when he was transferred to the U. S. S. *Saratoga*, and served on board said latter vessel as ordinary seaman and seaman until December 8, 1849, when he was honorably discharged from the service. It has long been held by this Department that the legal termination of the war with Mexico for pensionable purposes was May 30, 1848. (McClelland, Secretary, in re Michael Salmon, 3 L. B. P., 9, and in re Thomas Bruce, 4 L. B. P., 261; also Assistant Secretary Reynolds to Commissioner of Pensions, 7 P. D., 240.)

The records of the Bureau of Navigation of the Navy Department show that the *North Carolina* was the receiving ship at the Brooklyn Navy-Yard, port of New York, from November 1, 1843, to September 7, 1865, and that the *Saratoga* was put in commission at said navy-yard on April 10, 1848, and sailed from the port of New York under orders for the Mexican coast on April 17, 1848.

It is obvious, therefore, that the deceased sailor was merely transferred from the *North Carolina* to the *Saratoga* on April 10, 1848, when the latter ship went into commission, both vessels being in the

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port of New York on that date. Consequently, under the most liberal construction of the law, he could be considered as en route to Mexico only from April 17, 1848, the date upon which the *Saratoga* sailed from that port under orders for the seat of war. From that date to May 30, 1848, the date of the termination of the war with Mexico, a period of forty-three days, the sailor served in the Navy, in or during said war, en route to Mexico, and on the coasts or frontier thereof, but by no possible construction could such service be held to extend over a longer period. Since said naval service in the Mexican war en route to and on the coasts or frontier of Mexico was of less than sixty days' duration, it is manifest that it was not a pensionable service under the provisions of the act of January 29, 1887, and would confer no right or title to pension thereunder either upon the sailor or upon this appellant as his widow.

The only argument or contention made in the present appeal is that inasmuch as the sailor had been granted a pension as a survivor of the Mexican war under the provisions of the act of January 29, 1887, and subsequently an increase of said pension under the provisions of the act of January 5, 1893, the question of the sufficiency of his Mexican war service as a pensionable service under the provisions of the act of January 29, 1887, was res adjudicata, and could not now be called in question upon the application of his widow for pension under said act.

It is true that the deceased sailor was allowed a pension under said act under an erroneous construction of the law, made in a ruling of a former Commissioner of Pensions, which has long since been overruled, set aside, and abrogated by this Department, but the fact that the sailor was erroneously allowed and paid a pension to which he was clearly not entitled under the provisions of the law is certainly no good or sufficient reason whatever for the perpetuation of said error by continuing the allowance of such pension to his widow.

The rejection of this claim upon the ground stated was clearly not error, and is affirmed accordingly.

PRACTICE—REOPENING—LIMITATION.

JONATHAN KINSEY.

The rule of limitation for reopening rejected increase claims in cases where an appeal was filed before the rule had run is suspended during the period from the date of filing the appeal and the date of the decision of the Department thereon.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. October 16, 1900.

The claimant in this case, Jonathan Kinsey, late private Company C, Thirty-second Regiment Pennsylvania Volunteer Infantry, certificate No. 877605, is pensioned under the act of June 27, 1890, at $6 per

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month, for partial inability to earn a support by manual labor due to disability from varicose veins of right leg, and disease of heart, said rate having been allowed from February 10, 1892.

October 12, 1896, he filed a claim for increase, which was rejected August 21, 1897.

Claimant appealed from said action September 14, 1897, and by departmental decision of April 27, 1898, said action was affirmed.

May 17, 1898, claimant filed the affidavit of himself and his family physician tending to show increased disability, with a view of having his claim for increase reopened.

The Bureau by action of August 27, 1898, declined to consider the testimony filed to reopen, on the ground that it was not filed within ninety days from August 31, 1897, the date of the notice of rejection of the claim, as required by the rules of the Bureau.

Claimant appealed from said action September 12, 1898, contending that he appealed from the action rejecting his claim September 14, 1897. Said action was affirmed April 27, 1898, and he filed the testimony to reopen May 16, 1898, and under the facts the rules of practice of the Bureau were not violated, and said action was erroneous.

Claimant enlisted June 10, 1861, and was honorably discharged June 17, 1864.

The only question raised by the appeal and involved in the case is whether the Bureau action declining to consider the evidence filed to reopen the claim on the grounds stated was warranted; or, in other words, could the Bureau properly invoke the ninety-day rule as to filing evidence to reopen.

The rule of practice referred to in the order of rejection is found on page 122, paragraph 3, in The Practice of the Pension Bureau, which reads as follows:

> 3. Applications for reopening of increase claims and the filing of evidence thereunder should be limited to ninety days after the date of mailing the letter of rejection. If the application, with evidence, in such cases is not made within the ninety days as aforesaid, the rejection will be considered final.

I can see no objection to this rule in ordinary cases of increase claims where no appeal was taken before the expiration of the ninety days; but it should not apply in cases where an appeal from the action rejecting the increase claim was promptly taken by claimant or his recognized attorney.

When an appeal is properly filed further action in the case on the part of the Bureau is suspended until final determination by the Department, the Bureau having no longer any jurisdiction to take any action in regard to the claim until final disposition and the papers in the case are returned.

In the present case the increase claim was rejected August 21, 1897; claimant entered an appeal recognized in regular and legal form Sep-

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tember 14, 1897; the Department affirmed the action April 27, 1898, and the new evidence to reopen was filed May 17, 1898.

So that it is evident claimant was not guilty of any negligence or delay in taking the appeal, but acted promptly in the premises.

The notice of the rejection of the claim was mailed August 31, 1897, only ten days after the adverse action, and it is true that the testimony filed to reopen was not filed within ninety days thereafter.

But the appeal was filed September 14 following, and from that time until the departmental decision, April 27, 1898, the case was before the Department on appeal and the Bureau powerless to take any action in relation thereto.

In my opinion the ninety days referred to in the rule of limitation was suspended during the period from the date of filing the appeal and the decision of the Department thereon. In other words, the period between the date of filing the appeal, September 14, 1897, and the date of the departmental decision of April 27, 1898, should not be considered under the ninety-day limitation. So only thirty-four days of the period of the limitation prescribed by the rules of practice had run when the evidence to reopen was filed.

For the foregoing reasons I hold that there was no violation of said rule of practice in this case, and the action appealed from is hereby reversed, and the papers in the case returned for consideration of the testimony filed to reopen and for action thereon in accordance with the usual practice in such cases.

MARRIAGE AND DIVORCE—IMPEDIMENT—MASSACHUSETTS.

EMMA C. SANDERS, NOW STEWART (WIDOW).

Claimant married soldier in 1856 and lived with him as his wife in the State of Massachusetts until his second enlistment, December 18, 1863. Not having heard from her said husband since 1864 and believing him to be dead, she married one Stewart, in the State of Massachusetts, in November, 1870, and lived and cohabited with him as his wife, in said State (both believing said marriage to have been legal) until his death, which occurred August 16, 1889. The soldier died in the Soldiers' Home in Chelsea, Mass., December 18, 1882.

Held, That under the laws and decisions of the State of Massachusetts claimants' ceremonial marriage to Stewart was void, and that she was the wife of Sanders until his death in 1882, when she became his widow, but she and Stewart having lived together as husband and wife from the death of Sanders to the death of Stewart, each desiring to be and believing that they were husband and wife, they are deemed and held to have legally sustained the relation of husband and wife, and were such under the laws of that State from the death of Sanders to the death of said Stewart, when she became Stewart's lawful widow, and there being no pensionable period of widowhood between the death of Sanders and the time she became the wife of Stewart the rejection of her claim for pension on account of the death of Sanders was proper and is affirmed.

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Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 31, 1900.

Austin W. Sanders was in the military service of the United States from April 30, 1861, to November 21, 1862, as private in Company D, Thirteenth Massachusetts Volunteer Infantry, and was subsequently in said service from December 18, 1863, to August 15, 1864, as second lieutenant in Company I, Seventy-fourth United States Colored Infantry. It appears further that the soldier died of consumption on December 18, 1882, while an inmate of the Soldiers' Home in Chelsea, Mass.

On January 6, 1898, Emma C. Sanders, now Stewart, as the widow of said soldier, filed a declaration for pension under the provisions of the general law, which claim was adjudicated on July 28, 1899, and rejected on the ground that the claimant is not the lawful widow of the soldier. On November 4, 1899, claimant appealed from the action rejecting her claim under the provisions of the general law.

On December 2, 1899, claimant filed an application under the provisions of the act of June 27, 1890, which was rejected on January 29, 1900, upon the same ground as that upon which the general law claim was denied. An application to reopen said claim was rejected on April 30, 1900.

In order that the contention presented by the appeal may be clearly apprehended a brief recital of the material facts disclosed by the record is necessary. It appears that the claimant and the soldier were married in the State of Massachusetts on January 2, 1856, and that the parties lived together as husband and wife in said State up to the time of his first enlistment, as hereinbefore mentioned; that the soldier returned to his home after the termination of his first term of service and lived with the claimant until his reenlistment; that after his second enlistment he frequently wrote to his wife, the claimant, and occasionally sent her money, his letters being couched in affectionate terms, conveying assurances of affection and expressing an earnest desire to see her; that some time during the year 1864, he suddenly ceased to write and the claimant never heard from him again. The claimant, not having heard from the soldier since the termination of the war, and believing him to be dead, on November 24, 1870, married one Edson Stewart, with whom she lived in said State of Massachusetts until his death, which occurred on August 16, 1889.

It appears further that the soldier did not die in the service, but that some time subsequent to the termination of the war he applied for admission and was received as an inmate of the Soldiers' Home at Chelsea, Mass., and that when he made said application he represented himself to be a widower with no near relative. It also appears that he died in said institution on December 18, 1882. The material facts

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upon which the case is to turn are that the claimant, believing the soldier dead, married the second time in 1870, the second husband dying in 1889, about seven years subsequent to the soldier's death, and that all the parties resided in the State of Massachusetts.

On May 29, 1895, was approved an act of the legislature of Massachusetts which is as follows:

Where a marriage contract has been entered into with due legal ceremony and the parties thereafter live together as husband and wife, and where at the time of such marriage ceremony a former husband or wife of one of the parties was living, and the former marriage with such person was still in force; and where such subsequent marriage contract was entered into by at least one of the parties in good faith, in the full belief that the former husband or wife was dead, or that such former marriage had been annulled by divorce, or without knowledge on the part of one of them of such former marriage; and where the impediment to such subsequent marriage existing by reason of the former marriage is removed by the death of the other party to the former marriage, or by a proper decree of divorce, and the parties to such subsequent marriage then continue living together as husband and wife in good faith, on the part of at least one of them, they shall be taken and deemed to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be deemed to be the legitimate issue of both parties.

The above-recited act was amended on June 5, 1896, as follows:

The provisions of chapter four hundred and twenty-seven of the acts of the year one thousand eight hundred and ninety-five shall apply to cases in which the impediment to marriage therein referred to was removed prior to the date when said act took effect as to cases in which such impediment was removed subsequent to such date: *Provided*, That no marriage otherwise valid shall thereby be rendered invalid.

Under the provisions of the second section of the act of August 7, 1882, the validity of such marriages as that now under consideration is to be determined by the law of Massachusetts, the State in which the parties resided, both at the time when said marriage was contracted and when the right of pension, if any, accrued.

The main contention presented in the appeal is worthy of respectful consideration, and is as follows:

Our principal contention is that the relationship, whether legal or illegal, between the claimant and Stewart terminated on the latter's death in 1889—six years before the passage of the first act in question—and that no act or law could, intentionally or unintentionally, affect it in any way. In other words, as long as a contract or relationship is actually in existence—living, as it were—it is under legislative control and can be modified or nullified in many cases. But once the contract ceases to exist the legislature can not revive it or alter or modify it in any way. A statute requiring, for example, certain formalities in the execution of wills can have retrospective effect on those made prior to its passage, but not on those that have taken effect by the death of the testator (Am. and Eng. Enc., 943). Laws passed to legitimatize children can be made retroactive, but can not entitle them as next of kin to property of a parent who died prior to the passage of the act (Stover *v.* Keeling, 3 Hen. and M. (Va.), 228). Without doubt the issue of a void marriage can for all purposes be made legitimate, and a void marriage may be made valid, but it is absolutely necessary that the minor should be living and the relationship of husband and

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wife exist at the time the law is passed. There must be a contract of some kind in existence which the law is to make valid. It is well settled that where the contract (or relationship) is strictly of a personal nature the death of a party absolutely determines it. (Parsons on Contr., v. 1, p. 145.)

The only case referring to either of these statutes which I have been able to find is Tyler *v.* Tyler, 171 Mass., 150, where it was held that the legislature had the power to regulate the marriage of persons *domiciled within the Commonwealth.* In the present case only one of the parties, the claimant, was, at the time of the act, domiciled in the Commonwealth. If the Pension Office is correct, and a State can declare a marriage valid which had been void during the lifetime of both parties thereto, there seems to be no limit as to the legislative power over marriages. If a live person and a shade can be married, it is only a step to create marriages between dead people.

It seems to me that all that can fairly be gathered from the statute, in fact, all the legislature had power to do, is to declare that the fact that the impediment was removed prior to the passage of the act should not prevent the operation of the statute. But it is absolutely necessary that the parties affected be within the jurisdiction of the legislature at or after the passage of the act.

The claimant relies upon one proposition stated as follows:

A statute requiring, for example, certain formalities in the execution of wills can have retrospective effect on those made prior to its passage, but not on those that have taken effect by the death of the testator.

The claimant also relies upon the following proposition:

Laws passed to legitimize children can be made retroactive, but can not entitle them as next of kin to property of a parent who died prior to the passage of the act.

The propositions upon which the claimant relies rest upon the well-settled principle that a retroactive law can not operate to disturb vested rights or impair the obligation of contracts. The principle is stated on page 757, third volume American and English Encyclopædia of Law, as follows:

There is nothing in the Constitution of the United States to prohibit the several States from passing retroactive laws so long as they do not impair the obligation of contracts or partake of the nature of ex post facto laws or bills of attainder.

On page 758 of the above-mentioned authority it is also said:

The legislature has no power to pass a law impairing vested rights of property.

In volume 23, page 452, of the same authority it is said:

But it has been held that statutes, which are remedial in their nature and do not disturb vested rights, are to be construed liberally, even though retrospective in their operation, in order to accomplish the beneficent purpose for which they were enacted.

In Ex parte Buckley (53 Ala., 55) the court, after referring to laws which impair vested rights, said:

There are other statutes which, when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction for the consummation of the just and beneficent purposes in view has been freely accorded.

Such statutes are intended to remedy a mischief, promote public justice, correct

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innocent mistakes into which parties may have fallen, cure irregularities, or give effect to the acts and contracts of individuals fairly done and made.

The line of discrimination is well and definitely drawn between retrospective laws which are in harmony with and those which are repugnant to established principles of jurisprudence. To apply the principles above enunciated to the case at bar it becomes necessary to inquire into the status of the claimant at the time of the death of her first husband in 1882. If he was not divorced from her at that time, she unquestionably became his widow by operation of law and at once succeeded to all and every right incident to that relation, including any rights in the property of her husband under existing statutes of distribution. By virtue of the military service of her husband she also had a right under existing laws to make application for pension. The retroactive law of the State of Massachusetts, passed in 1895, could not be construed in such a way as to destroy any of the above-mentioned rights.

But there is another aspect of the case which deserves consideration in this connection. Under the pension laws, both the general law and the act of June 27, 1890, a widow is entitled to pension during the period only which intervenes between the death of the husband under the former and between the date of application under the latter and the death or remarriage of the widow. If there is indeed no such intervening period, then there can be no period during which such an applicant might be pensionable. This leads to an inquiry as to the true legal relation between the applicant and the second husband from the death of the first.

The retroactive law, in so far as it went to invest the claimant with a marital relation to the second husband, was in perfect harmony with her own desire and will, as indicated by the fact that she continued to cohabit with said second husband up to the time of his death. It destroyed no vested right, but was a mere curative remedy, which bestowed a social status upon her and operated to legitimize any issue of said second marriage.

The claimant earnestly contends that the legislature had no jurisdiction to pass a retroactive law affecting the marital relation of the parties unless both parties were in life at the time the law was passed. "If a live person and a shade," says the claimant, "can be married, it is only a step to create marriage between dead people."

But the legislature was only seeking to confirm or ratify a relation between the parties which began at the death of the first husband. It had no power, of course, to legalize the void marriage of the claimant in 1870. When, however, the parties to the second marriage continued to cohabit as man and wife, after the removal of the impediment, they thereby established a relation recognized as a common-law marriage in all the States where there is not a statute declaring that such

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marriages are void. There appears to be no such law in the State of Massachusetts. It is not at all clear, therefore, that the parties to the second marriage needed the intervention of the retroactive legislation of 1895 to render their marital relations valid after the death of the first husband in 1882. From this time until the death of the second husband it appears that the parties in good faith regarded themselves as man and wife, and were so regarded in the community in which they resided.

In the case of Meister *v.* Moore (96 U. S. Reports, 78) the Supreme Court of the United States held as follows:

The learned judge of the circuit court instructed the jury that, if neither a minister nor a magistrate was present at the alleged marriage of William A. Mowry and the daughter of the Indian, Pero, the marriage was invalid under the Michigan statute; and this instruction is now alleged to have been erroneous. It certainly withdrew from the consideration of the jury all evidence, if any there was, of informal marriage by contract *per verba de præsenti*. That such a contract constitutes a marriage at common law there can be no doubt, in view of the adjudications made in this country from its earliest settlement until the present day. Marriage is everywhere regarded as a civil contract. Statutes in many of the States it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence, they are not within the principle that where a statute creates a right and provides a remedy for its enforcement the remedy is exclusive. No doubt a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed.

A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license or publication of banns or be attested by witnesses. Such formal provisions may be construed as merely directory instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent; and such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. This is the conclusion reached by Mr. Bishop after an examination of the authorities. (Bishop, Mar. and Div., sec. 283 and notes.) We do not propose to examine in detail the numerous decisions that have been made by the State courts. In many of the States enactments exist very similar to the Michigan statute, but their object has manifestly been not to declare what shall be requisite to the validity of a marriage, but to provide a legitimate mode of solemnizing it. They speak of the celebration of its rite rather than of its validity, and they address themselves principally to the functionaries they authorize to perform the ceremony. In most cases the leading purpose is to secure a registration of marriages and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry. In a small number of the States it must be admitted, such statutes have been construed as denying validity to marriages not formed according to the statutory directions. Notably has this been so of North Carolina, and in Tennessee, where the statute of North Carolina was in force; but the statute contained a provision declaring null and void all marriages solemnized as directed without a license first had. So in Massachusetts it was early decided that a statute very like the Michigan statute rendered illegal a marriage which would have been good at common law, but which was not entered into in the manner

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directed by the written law. (Milford *v.* Worcester, 7 Mass., 48.) It may well be doubted, however, whether such is now the law in that State. In Parton *v.* Henry (1 Gray, Mass., 119), where the question was whether a marriage of a girl only 13 years old, married without parental consent, was a valid marriage (the statute prohibiting clergymen and magistrates from solemnizing marriages of females under 18 without the consent of parents or guardians), the court held it good and binding, notwithstanding the statute. In speaking of the effect of statutes regulating marriage, including the Massachusetts statute (which, as we have said, contained all the provisions of the Michigan one), the court said: "The effect of these and similar statutes is not to render such marriages, when duly solemnized, void, although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent as far as possible, by penalties on them, the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled; but, in the absence of any provision declaring marriages not celebrated in a prescribed manner or between parties of certain ages absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though had in violation of the specific regulations imposed by statute." There are two or three other States in which decisions have been made like that in 7 Massachusetts.

We will not undertake to cite those which hold a different doctrine, one in accord with the opinion we have cited from 1 Gray. Reference is made to them in Bishop, Mar. and Div., sect. 283 et seq.; in Reeve's Domestic Relations, 199, 200; in 2 Kent, Com., 90, 91; and in 2 Greenleaf on Evidence. The rule deduced by all these writers from the decided cases is thus stated by Mr. Greenleaf:

"Though in most, if not all, the United States there are statutes regulating the celebration of marriage rites and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be void, or that none but certain magistrates or ministers shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statute regulations, would still be a valid marriage."

As before remarked, the statutes are held merely directory, because marriage is a thing of common right, because it is the policy of the state to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.

In the case of Milford *v.* Worcester (7 Mass., 48), a decision was rendered in 1810 upon the following facts:

The evidence of a marriage between the said Stephen and Rhoda was: A certificate by the town clerk of Upton, in the county of Worcester, that in the book kept for that purpose there is an entry July 6, 1784, of the intentions of marriage of Stephen Temple and Rhoda Essling; and by the deposition of the said Rhoda and the testimony of other witnesses, it appeared that in the year 1784, and several years before, the said Stephen and the said Rhoda (then Rhoda Essling) were residents in Upton; and some time in that year they came together to a tavern in Upton when —— Dorr, esq., then a justice of the peace for the county of Worcester, happened to be there, and producing a certificate that their intentions of marriage had been published, requested him to marry them; but he after some inquiry into the cause of the application to him, refused to take an active part, as the witnesses expressed. The said Stephen and the said Rhoda continued notwithstanding in the room where the said Dorr was, and there in his presence and before several other witnesses, the said Stephen declared that he took the said Rhoda as his lawful wife, and she declared that she took him as her lawful husband, and each made to the other the vows and promises usual in contracting marriages. According to some of the testi-

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mony offered for the plaintiffs, this proceeding was directed and encouraged by the said Dorr; but this part of the testimony was contradicted by the deposition of Dorr, and the judge left it to the jury to decide upon the whole evidence whether the proceedings had the sanction in any degree of the said Dorr acting as a magistrate.

The jury found that the proceedings did not have the sanction of the magistrate.

Upon these facts, under an existing statute which provided that no person but a justice of the peace or an ordained minister of the gospel should join any persons in marriage, the court held the marriage to be unlawful.

In the case of Thomas J. Parton *v.* Susan Hervy (67 Mass., 119), decided in 1854, the court announced this principle:

The age of consent in this Commonwealth, as by the common law, is 12 in females and 14 in males, and a marriage between two infants above these ages is valid without the consent of their parents or guardians, notwithstanding the Revised Statutes, chapter 75, sections 15, 19, which prohibit magistrates or ministers, under a penalty, from solemnizing the marriage of a female under the age of 18 or a male under the age of 21, without the consent of the parent or guardian.

This case arose under habeas corpus proceedings instituted against the mother of the girl, who took forcible possession of her subsequent to the marriage.

In the opinion the court say:

But in the absence of any provision declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, although had in violation of the specific regulations imposed by statute.

This appears to be a direct and positive declaration to the effect that common-law marriages are recognized in the State of Massachusetts, and is in effect a substantial overruling of the opinion rendered in 1810. This appears to be the view taken by the Supreme Court of the United States in the case above mentioned.

It appears, therefore, that the claimant became the lawful wife of the second husband from the date of the removal of the impediment, in view of which there was no intervening pensionable period of widowhood during which she was pensionable.

In the light of what has been said, the contention of the claimant to the effect that the legislature of Massachusetts had no jurisdiction to legalize a void marriage after the death of one of the parties, by retroactive legislation, loses its force. The action of rejection is affirmed, not upon the ground that the claimant is not the lawful widow of the soldier, but upon the ground that there was no intervening pensionable period of widowhood between the death of the first husband and her marriage to Stewart.

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PRACTICE—ACT OF MARCH 6, 1896—INCREASE—RESTORATION.

ANDREW J. BROWN.

The practice of refusing to consider a claim for restoration to a former rate, or one which invokes the act of March 6, 1896, when such are included in a claim for increase under the act of June 27, 1890, is unsound practice. Paragraph 3, page 102, and paragraph 1, page 103, of "A treatise on the practice of the Pension Bureau," approved by the Secretary of the Interior on April 9, 1898, are accordingly amended.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. October 31, 1900.

Andrew J. Brown, formerly a private in Company A, Eighth Illinois Volunteer Cavalry, and a pensioner under the act of June 27, 1890, at $12 per month (Certificate No. 515571), had his rating reduced, on November 23, 1893, by due process of law, after medical examination, to $6 per month.

On September 17, 1897, he filed a declaration for increase, increase being granted on May 19, 1898, to $12 per month. The last-mentioned declaration contained the following statement, viz:

He also believes that the reduction of his pension to $6 per month was erroneous, and he therefore claims a rerating at the rate originally allowed him, viz: $12 per month from the date of reduction.

No attention was paid to the request embodied in the quoted statement, and an appeal was filed on August 27, 1898, from the refusal of the Commissioner of Pensions to restore him to his original rate from the date of reduction.

Although the term "rerating" is used in claimant's declaration, the declaration is not one for "rerating" within the meaning of the word as it is generally used in pension matters. It is a declaration for increase, coupled with a request for restoration from the date of reduction, to the rate in force when he was reduced. In other words, it is a claim for increase and restoration to rate from date of reduction.

Paragraph 3, on page 102, of A Treatise on the Practice of the Pension Bureau, published in 1898, is as follows:

When a declaration for increase is filed on account of the old, or newly alleged causes of disability, and in the same declaration the claimant states that he wishes to secure a restoration of the former rate from date of reduction, or that he claims pension from the date of filing a prior application, or a higher rate from the date of commencement of original pension, such claim will be treated as a claim for increase, and that part of the claim which relates to the other matters stated herein will be rejected as informal.

The paragraph quoted rules out three classes of claims from consideration if they are embodied in a declaration for increase filed under the act of June 27, 1890, viz:

First. A claim for restoration to a former rate, which rate has either been reduced or wholly taken away.

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Second. A claim for a pension under a former declaration.

Third. A claim that any rate, previously allowed, was not commensurate with the disability shown to exist.

As to the first class, it appears to the Department, after careful consideration of all matters that enter into such a claim, that a refusal to consider such a claim, if it is embodied in a declaration for increase, works an unnecessary hardship on claimants, and would seem to serve no good purpose from an administrative standpoint. It compels a claimant to file many extra papers, and await two adjudications, when the end to be attained could easily be gained by the filing of one declaration and the necessary affidavits, and have both issues decided at the same time. The question as to what rate a soldier is entitled to to-day, and what he was entitled to when reduced or dropped, involves a consideration of the same class of testimony, and all of the facts under both issues are before the Bureau at the same time. It would seem, therefore, that both questions could be more easily considered, and conclusions reached at that time, with less labor and under better conditions than at any other date.

As to the second class, it is first remarked that such a claim is nothing more or less than the invoking of the act of March 6, 1896. It has been held by the Department that no formal application need be filed under said act in order that a claimant may have its benefits. Said act does not alter the law in a single respect from what it was previously. It but reiterates that if the evidence shows a soldier to be pensionable at the date of the filing of a declaration, then his pension should commence from such date. Inasmuch, then, as no declaration is necessary, it would seem that a rule which practically compels him to file one is incongruous, and would be a violation of the intent of the act of March 6, 1896. An embodiment in a declaration for increase, of a claim that a pensioner is entitled to a rating under a declaration previously filed, and which claim has been rejected, is, as stated, but an invoking of the principles of the act of March 6, 1896, and it would seem as sensible and reasonable to include it in a claim about to be filed as to make it the contents of a separate document.

The third class refers to a claim that the rate originally allowed was insufficient.

While the argument used in discussing the first class of claims is applicable, to a considerable extent, to the third class, yet when such a claim is analyzed it will be seen that a claim of the third class is practically one of rerating. This Department has sustained the rule that a rerating claim and one for increase, under the general law, should not be embodied in the same declaration; and the same reasons which lead to such a conclusion would apply with equal force to a similar declaration under the act of June 27, 1890. The practice, then, of refusing to consider a declaration based upon an allegation

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that a former rating was inadequate, in connection with a declaration for increase, is sustained.

In view of the foregoing it is hereby ordered: That paragraph 3, on page 102, of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898, be, and the same is hereby, amended to read as follows:

If a declaration for increase filed under the act of June 27, 1890, contains an allegation that claimant has been wrongfully reduced or dropped, or if such declaration for increase contains an allegation that claimant's pension should have commenced at the date of the filing of a declaration prior to the one under which he was originally granted a pension under the act of June 27, 1890, such allegations will be considered and adjudicated. If such a declaration for increase alleges that claimant is entitled to a higher rate than that allowed under any previous declaration, such allegation, being practically for rerating, will be treated as invalid. A claim for increase and rerating under the act of June 27, 1890, will be treated solely as one for increase.

Paragraph 1, page 103, of said treatise, being in conflict with the above order, it is hereby ordered that the last sentence in said paragraph 1, page 103, be, and the same is hereby, stricken out.

The refusal to consider the claim for restoration in the within claim is reversed and set aside, and the claim will be reopened in accordance with the above order.

Action reversed.

Approved:

E. A. HITCHCOCK, *Secretary.*

DISLOYALTY—SECTION 4716—EVIDENCE.

JOHN H. KIMBALL.

The record shows claimant as "transferred" to Colonel O'Neill from Andersonville, Ga., a rebel recruiting officer. There is no record or evidence in the case of enlistment in the Confederate States Army, or of any act on claimant's part of aiding or abetting the rebellion.

Held: The action of dropping was unlawful.

One has an undoubted right to escape the rigors of prison life in any way that presents itself, as well outside as inside the prison, if in so doing he does not aid or abet the enemy. The opinion in the case of Milo Ousterhout (7 P. D., 270), is not in conflict with such doctrine.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. October 10, 1900.

John H. Kimball, formerly a corporal in Company G, Fifteenth Massachusetts Volunteer Infantry, and a pensioner under the act of June 27, 1890, at the maximum rate, was dropped from the rolls on August 31, 1895, under section 4716 Revised Statutes. An appeal

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filed on June 28, 1898, contends that rejection is contrary to law and fact.

There being an important feature in this case on which this Department desired full information, the case was returned to the Commissioner of Pensions with the following opinion:

The records of the War Department show that soldier enlisted on July 21, 1861, and was present on rolls up to April 30, 1864. Captured at Fredericksburg, Va., May 9, 1864, confined at Richmond, Va., May 9, 1864, sent to Andersonville, Ga., June 8, 1864, and "transferred to Colonel O'Neill, rebel recruiting officer, January 23, 1865." "Released" at Savannah, Ga., April 22, 1865, mustered out at Boston, Mass., June 6, 1865.

The procedure taken in this claim gave rise to correspondence on the part of the member of Congress from claimant's district, the Chief of the Record and Pension Division of the War Department, and the Commissioner of Pensions, part of said correspondence being in evidence herein. In this correspondence is a copy of a letter purporting to have been written by the said Chief of the Record and Pension Division, in which claimant's record is recited as hereinbefore set out, with the following additional remarks:

"No record has been found to establish that this man actually enlisted in the Army of the Confederate States, or to show his whereabouts and status between January 23, 1865, and April 22, 1865."

The letter in which the above occurs, dated June 26, 1895, was evidently inclosed in another letter written by the aforesaid member of Congress to the Commissioner of Pensions, to which the Commissioner of Pensions replied under date of July 13, 1895. In this reply the reasons for dropping claimant's name from the rolls are gone into, somewhat in detail, as follows:

"It is not necessary to show enlistment in the Confederate States Army to bar a man's right to pension. Section 4716, Revised Statutes, provides 'that no money on account of pension shall be paid to any person, etc., who, in any manner, voluntarily engaged in or aided or abetted the late rebellion.' The statement made by the Chief of the Record and Pension Division that 'no record has been found to establish the fact that this man actually enlisted in the Army of the Confederate States,' is not sufficient to give this claimant status. The statements of Mr. Kimball in his affidavit are not borne out by the facts as known to this Bureau. The Bureau is in possession of information that a large number of prisoners at Andersonville—several hundred in all—were, on January 23, 1865, transferred to Colonel O'Neill, a rebel recruiting officer, having volunteered to go with him and build stockades and do guard duty, and it appears that this pensioner was among them. They did this no doubt to escape the rigors of prison life, but the Assistant Secretary, in decision No. 118, has held that they are not now entitled to pension."

In order that the foregoing may be better understood, claimant's statements are herewith set forth: He asserts in his affidavits that while confined at Andersonville, about the time of Sherman's raid, a call was made at the prison at Andersonville for men to build additional barracks for the accommodation of the prisoners, just outside the stockade. The soldier and a few others agreed to go out, concluding among themselves that the chance of escape was greater outside than inside the stockade. Instead of being put to work just outside the stockade they were taken to Macon, Ga., and allowed to rest a few days. While thus resting, claimant, in company with six others, escaped and made their way to Savannah, Ga., where they gave themselves up to the Union pickets; that he never enlisted in the Confederate States Army, and never took the oath of allegiance to the Confederate States. He states he can not verify his statement, as to details, for he has no means of knowing the whereabouts of his comrades.

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A very peculiar phase of this case is brought about by the statement of the Commissioner of Pensions that the Bureau is in possession of information to the effect that "several hundred" of Andersonville prisoners "volunteered" to build stockades and do guard duty, and were transferred to Colonel O'Neill, a rebel recruiting officer, for that purpose, and that this information negatives claimant's version, further stating "they did this, no doubt, to escape the rigors of prison life, but the Assistant Secretary has held, in Decision No. 118, that they are not now entitled to pension."

These statements are open to several very serious objections. First. If the Bureau of Pensions has the information stated, it is not in this case, and most assuredly pensioner can not be deprived of his pension by reason of "information" not in evidence. Claimant is entitled to know what this evidence consists of, where it was obtained, and with whom it originated. A pensioner must be given the statutory opportunity and time, under the law, to refute any charges by which it is proposed to drop his name from the rolls. It is not enough for the Commissioner of Pensions to say that he possesses "information." The pensioner has undoubtedly the right to know all about such information and to refute it if he can. This principle is elementary, too much so to admit of discussion, and any other procedure is in the nature of star-chamber practice, which method has never been tolerated in the United States.

Now, in order (inasmuch as an important issue is involved) that the case may be legally and effectually disposed of under the present appeal, the papers are herewith returned to you with a request that you furnish this Department with the following information, viz: What is the precise information in the possession of the Pension Bureau regarding "several hundred" of Andersonville prisoners who were transferred to Colonel O'Neill on January 23, 1865; what does the information consist of; when did it originate; and when and where was it obtained? In short, what evidence is there in the possession of the Pension Bureau that this appellant ever aided or abetted the war of the rebellion?

Upon a return of the papers, together with the information requested here, this case will receive further consideration.

The reply of the Commissioner of Pensions to the above has been received by this Department under date of July 31, 1900, and is as follows:

In response to your letter of the 30th ultimo, requesting a further report in this claim, setting forth the information upon which the Bureau based its action dropping the pensioner's name from the roll, I have the honor to submit the following:

The action of dropping in this claim, which was taken August 31, 1895, upon notice dated June 19, 1895, appears to have been based on the record of the War Department, which is referred to in the notice to pensioner, as follows:

"You are informed that it is shown by a report from the records of the War Department, filed in this office, that you exchanged your condition as prisoner of war for service in the Confederate States Army."

The record alluded to in the above notice shows that this soldier, while a prisoner of war at Andersonville, Ga., was "transferred to Colonel O'Neill, rebel recruiting officer, January 23, 1865," was "released at Savannah, Ga., April 22, 1865," and subsequently mustered out on individual muster-out roll at Boston, Mass., June 6, 1865.

In a letter to Hon. J. H. Walker, member of Congress from Massachusetts, dated July 13, 1895, it is stated that—

"The Bureau is in possession of information that a large number of prisoners at Andersonville—several hundred in all—were, on January 23, 1865, transferred to Colonel O'Neill, a rebel recruiting officer, having volunteered to go with him and

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build stockades and do guard duty, and it appears that this pensioner was among them."

This statement is presumed to refer to record evidence and other data contained in various claims in this Bureau, which it would be difficult at this time to identify.

Many pensioners who had been placed on the pension roll under the act of June 27, 1890, at a time when it was held that disloyalty was no bar to pension under that act, were subsequently dropped from the roll after the Department had reversed its ruling on that point. Quite a considerable number were dropped, like this claimant, on a record showing that they had rendered service under Colonel O'Neill, but, as above stated, it would be difficult now to go through the file of the Bureau and identify these claims.

But while this information—that several hundred prisoners had enlisted to serve under Colonel O'Neil—was stated in a letter to Congressman Walker, in reply to his communication, it was not embodied in the notice to pensioner, nor is it understood that this information was a ground of the action taken by the Bureau in this case. The Bureau's action in this case appears to have been based upon the record of the War Department showing specifically this soldier's service under Colonel O'Neill.

That Colonel O'Neill recruited an organization from among the prisoners at Andersonville it is presumed is not questioned, especially in view of claimant's admissions. Claimant admits that he with seven other prisoners, in response to a call for "volunteers," went with Colonel O'Neill, ostensibly to build barracks for the officers, but really to try to make his escape; that they went with him as far as Macon, Ga., where claimant made his escape. Claimant's statement that he made his "escape" at Macon is not corroborated by the record. On the contrary, the record shows that he was "released, April 22, 1865, at Savannah, Ga.," three months subsequent to the date of his "transfer" to Colonel O'Neill. On its face this record shows that claimant's service under Colonel O'Neill covered a period of three months from the date of his "transfer" at Andersonville till his "release" at Savannah, Ga. Claimant can not give the names of any of the seven men who went with him. Men who, he says, felt that they "could trust each other," and we therefore have only his word as to the character or incidents of his service with Colonel O'Neill or his motive for joining his command. His statements are uncorroborated, and he virtually admits that they can not be corroborated.

It may be stated that the "information" referred to in the Bureau letter of July 13, 1895, to Congressman Walker, that several hundred prisoners had enlisted at Andersonville under Colonel O'Neill, has no specific reference to this soldier, The Bureau has no information having a direct bearing on the question of his Confederate service other than that contained in the record in this claim, showing his transfer, while a prisoner, to Colonel O'Neill, "rebel recruiting officer," his subsequent "release," and his admissions in connection therewith above referred to.

It may be suggested that evidence tending to show that claimant's enlistment was merely a ruse to escape imprisonment, raises a question of fact, or motive, to be considered and decided as such. But, that Colonel O'Neill's organization, was a rebel organization, and that voluntary service therein was an act of disloyalty is assumed to be admitted. It is believed to be equally clear that, in the absence of rebutting evidence, the record in this case fully warranted the action of dropping pensioner's name from the roll."

It is seen by the foregoing that the Pension Bureau has not in its possession—at least admits that it can not produce it—a list of the names of several hundred Andersonville prisoners who were transferred to Colonel O'Neill, having volunteered to go with him and help build stockades and do guard duty, which list included this claimant's

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name. The Bureau also claims that such information plays no part in the rejection of the claim, although its letter to Congressman Walker would seem to convey the contrary impression.

Under the statements made in the letter of the Commissioner of Pensions of July 31, 1900, to this Department, it is clear that, as the case now stands, the claim stands rejected upon the evidence contained in the record of this claim showing his transfer, while a prisoner, to Colonel O'Neill, "rebel recruiting officer," his subsequent "release," and his admissions in connection therewith. To said evidence, then, the further discussion of the claim will be directed.

The record shows claimant "transferred to Colonel O'Neill, rebel recruiting officer, January 23, 1865;" and the War Department further states, "No record has been found to establish that this man actually enlisted in the Army of the Confederate States."

Now, it is within the knowledge of this Department that no official records kept at Andersonville prison ever fell into the hands of the Federal authorities save a very few hospital records. The prisoner-of-war records do frequently show the enlistment into the Confederate States Army of many Union prisoners who were or had been confined at Andersonville, and those individuals generally came into the Confederate States Army through the instrumentality of Colonel O'Neill. The records of these men, however, were never obtained from the records of Andersonville prison. They were obtained in different sections of the Confederacy, from records showing the component parts of the several commands, the same as many company and regimental records of the Union volunteers, outside of and independent of the Federal records, show when, where, how, and by whom the members of the regiments and companies were enlisted.

It has been almost universally held that, when such Confederate records show a prisoner enlisted by Colonel O'Neill, the presumption immediately attaches that such enlistment was voluntary, and a voluntary enlistment in the Confederate States Army, per se, is prima facie, an aiding and abetting of the rebellion. This is the position taken in said decision No. 118, which is the opinion in the case of Milo Ousterhout (7 P. D., 270), cited in the letter quoted from herein.

In the Ousterhout case supra, and which is evidently the basis of your action in the within claim, it is shown that Ousterhout while a prisoner at Andersonville, actually enlisted in the Tenth Tennessee, Confederate States Infantry, and was captured in arms by the Federal Army at Egypt Station, Miss., December 28, 1864. In the discussion of Ousterhout's status, reference was made to the case of Russell S. Cole (4 P. D., 141), in which case Cole admitted that he took the oath of allegiance to the Confederate Government, and did not join his command until June 5, 1865, at which date the rebellion had virtually collapsed. Cole also admitted that he did so "solely to save his life and get out of the stockade and into the Union lines."

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It is desired, in order that no misapprehension may arise in the future, to call especial attention to just what the Ousterhout case decides, and such is found in the summing up of the conclusions at the end of the opinion in the case. It decides, first, that an enlistment in the Confederate Army will be presumed to be voluntary, and that such an act is an aiding and abetting the rebellion; second, that the presumption by reason of such enlistment can be overcome only by the most positive, direct, and satisfactory evidence, and that the fact that one was confined in a Confederate prison is not such evidence.

In the present case there is no record of enlistment in the Confederate States Army, and claimant swears that he never did so enlist, and never took the oath of allegiance to the Confederate States. It is not proposed to deviate an iota from the principles and doctrines laid down in the Ousterhout case, but this case does not fall within the purview of the Ousterhout case, for the pivotal point on which the Ousterhout case turns, is wholly missing in the present one. The Ousterhout case can not, then, be made a basis for the rejection of the within claim.

Another question in the case to be discussed is, Is the fact that this appellant was "transferred" to Colonel O'Neill sufficient to raise any presumption of disloyalty?

The fact that a prisoner was turned over from one Confederate officer to another Confederate officer—and that is all the record shows—carries no such presumption with it. The cause for such transfer is apparent only by claimant's testimony, and he states it to be that he agreed to such transfer for a specific object, viz, to build larger and better accommodations for his fellow prisoners just outside the stockade. This he was not allowed to do, but was taken a long distance away, and in time made his appearance in the Union lines, at Savannah, Ga.

Because a prisoner of war was "transferred" from the officers of one branch of the Confederate service to an officer of another, notwithstanding the fact that the last-mentioned officer was a recruiting officer, is not sufficient of itself to show that the said prisoner enlisted. Few prisoners actually enlisted without the record of such enlistment eventually making its appearance somewhere in the Confederate archives, and the absence of such a record of enlistment of claimant is a point decidedly corroborative of his assertion that he never did enlist. The record "transferred" is not enough, per se, to prove the fact of enlistment.

The record shows claimant as "released" at Savannah, Ga., three months after he was transferred to Colonel O'Neill, and the same question arises as did under the record of "transferred." If he was a prisoner of war in the hands of the Confederacy, a release would naturally mean that the Confederates turned him over to the Federal officers as a prisoner. It certainly could not imply that he was an

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enlisted man in the Confederacy. That many Union prisoners made their escape, as well as were released, during Sherman's march to the sea, and joined the Federal army during said march, as well as at Savannah, is too well authenticated by history to be disputed. That the Confederate record shows him "released" at a time when the Confederacy was in the last stages of dissolution, and when little care might naturally have been taken in a choice of words to express a technical meaning, does not seem, to this Department, to warrant a conclusion, unless strongly supported by other evidence, that the released man was an enlisted man in the Confederacy.

It must certainly be apparent by what has been recited that there is nothing in the record which warrants a conclusion that this soldier ever enlisted in the Confederate Army or ever took the oath of allegiance to the Confederate States.

It is not disputed for an instant but that one, even though he be a prisoner in Andersonville, could aid and abet the war of the rebellion in other ways than by enlisting in the Confederate States Army. Whatever this appellant may actually have done in this direction we have nothing whatever to do with, only so far as the evidence in the case discloses.

It may be assumed as proved that the record does not show any enlistment in the Confederate Army or any aiding or abetting of the war of the rebellion. The only evidence on this question is found in his own testimony, wherein he states that he volunteered to help build stockades for the better accommodation of the prisoners in Andersonville, but that when he was released from the prison he was not allowed to do so. He was taken to Macon, but does not state how long he was on the way to that place from Andersonville. He asserts that he was allowed to rest at Macon a few days and then made his escape. There is nothing partaking of the marvelous or improbable in his narration, and this sequence of events described by him is the same as in hundreds of cases known to actually have happened. There is certainly nothing in his story which warrants an assumption that it is false. It was but eighty-nine days from the time he was transferred until he made his appearance at Savannah—not a remarkably long space of time to have been used in being taken from Andersonville to Macon and in making his way from thence to Savannah.

The issue in this case narrows itself down to the question, Was the act of volunteering to build larger quarters for his fellow-prisoners at Andersonville aiding or abetting the rebellion?

There is nothing in the Statutes which prevents a prisoner of war who offered to alleviate either his own or his comrade's condition from drawing a pension, provided he did not aid or abet the rebellion by so doing; and the theory that the offer to help in building better and more commodious quarters for fellow-prisoners in such an act does not seem to be warranted.

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The willingness to assist in building larger quarters for the Union prisoners, even if carried into execution, would not be aiding or abetting the rebellion. From almost any standpoint at which such a proceeding can be viewed, it would appear to be the opposite.

The phrase, "to escape the rigors of prison life," is altogether too general a one on which to deprive one of a pension. One has an undoubted right, under the law, to escape the rigors of prison life outside the prison, if he can get out, just as much as he has to escape them inside the walls, provided he does not aid and abet the enemy by so doing.

Suppose the soldier had actually engaged, inside the prison walls, and under the direction and supervision of a Confederate officer, in making himself and fellow-prisoners more commodious quarters, or in alleviating their condition in a variety of ways; would he be aiding or abetting the rebellion thereby? Is the offer to do so, outside the prison walls, any more reprehensible?

There is not a scintilla of proof in the within case to show that the appellant ever aided or abetted the rebellion in any manner, or ever offered to, or intimated that he was willing to do so. If he actually did, there is no evidence of such to be found in the papers.

Upon a very careful reading of the letter to the Department dated July 31, 1900, and embodied herein, two things are apparent, first, You evidently considered the record and claimant's admissions to be sufficient proof of an actual enlistment in the Confederate States Army. Second, You state that claimant "exchanged" his "condition as prisoner of war for service in the Confederate States Army."

As to the first, it is shown in this opinion that the record and testimony not only are not direct proof of an enlistment in the Confederate States Army, but that the record, taken with the evidence, is not sufficient to raise such a presumption.

As to the second, it is sufficient to state that there is no evidence, of any nature, that he ever served, or rendered service, in the Confederate States Army.

The action appealed from is reversed.

MARRIAGE AND DIVORCE—EVIDENCE—PRESUMPTIONS—PROOF.

LOUISA C. GERMAIN AND MARY C. ORR.

1. There is no conflict between the decisions in the Germain and Orr cases.
2. In the Germain case it was held that the presumption was, in the absence of proof to the contrary, that soldier had been divorced from his first wife at the time of his second marriage to the claimant; but such presumption is rebuttable.
3. In the Orr case the presumption of divorce was rebutted by the evidence of the first wife and the records of the court showing that no divorce had been procured as claimed.

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Assistant Secretary F. L. Campbell to the Commissioner of Pensions, October 30, 1900.

I am in receipt of your favor of the 5th instant, in which you invite my attention to inclosed copies of departmental decisions in the pension claim of Mary C. Orr (10 P. D., 348) and Louisa C. Germain (11 P. D., 66). Concerning the same you say:

In both of these cases the Department of the Interior has rendered decisions involving the question of presumption of divorce in cases of second marriage, and these decisions are in apparent conflict as to the weight which should be given to evidence of a certain character, and also as to the grounds upon which they are based.

After reciting the material facts disclosed by the records of the cases, respectively, and the actions taken upon the same by the Bureau of Pensions and by the Department, you say further:

In view of the fact that cases involving the same questions as are involved in these cases are constantly arising, and said decisions are directly in conflict with each other as to the presumptions which arise in such cases and the grounds upon which they rest, I have the honor to request that they be harmonized for the guidance of this Bureau in the future in acting upon cases involving the same questions.

I respectfully submit that the decisions referred to are not conflicting in any material respect, and, therefore, do not need "to be harmonized," as suggested, but that both opinions are supported by well-recognized principles of jurisprudence.

On January 20, 1900, the Department rendered a decision in the case of Louisa C. Germain, in which the action of rejection was affirmed.

In this opinion the evidence relating to the divorce of the husband from his first wife was not set out, but it was therein stated as a fact, which had been positively shown by the evidence adduced on special examination, that there was no such divorce. Subsequent to this the claimant filed additional evidence as a basis for reopening her said claim, which evidence was, upon consideration by the Bureau, held to be insufficient to warrant a different disposition of the claim, whereupon she appealed from this action. Upon this appeal a decision was rendered on September 14, 1900, reversing the action complained of, based upon the proposition that the presumption of the validity of claimant's marriage to the sailor was not overcome by the evidence tending to show that the sailor had not been divorced from his first wife.

The latter decision in the Germain case, being based upon an appeal from the rejection of an application for reopening, and not upon a motion for reconsideration, substantially overruled the former upon a question of evidence.

You request me to institute a comparison between the case of Mary C. Orr and that of Louisa C. Germain, rendered on September 14,

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1900, as they involve "the question of presumption of divorce in cases of second marriage." You submit the contention that, in the respect above mentioned, the two cases "are directly in conflict with each other," and request that they be harmonized for the guidance of the Bureau of Pensions.

In the Germain case it is held that—

> It may be assumed as a principle of well-nigh universal application that the presumption of innocence and legality obtains as to all proven marriages, and that, in cases where one party has been shown to have married twice, the presumption of the validity of both marriages obtains until the contrary is shown by competent proof. Where a second marriage is shown, the legal presumtion at once arises that the first marriage had been dissolved either by death or divorce at the time the second was contracted.

The last proposition is a corollary incident to the first, otherwise there could be no presumption except in favor of first marriages. It is equally true that such presumptions are disputable and may be overcome by evidence.

The soldier Orr was twice married and so was the sailor Germain, and when these facts were proven, the presumption at once arose that both of the marriages were valid and lawful. In this respect the cases are parallel. Samantha Orr lost her case because the presumption in favor of her marriage was overcome by direct and positive evidence that the soldier had not been divorced from his first wife. Louisa C. Germain succeeded in her claim because there was no competent evidence to overcome the presumption in favor of her marriage. In that respect the two cases are entirely different. In so far as the question of presumption is concerned there is no want of harmony. In the Orr case the presumption yielded to evidence. In the Germain case the evidence in conflict with the presumption amounted to nothing.

Samantha Orr, alleged to be the second wife of the soldier, filed a claim for pension on April 13, 1897, alleging that the soldier had been divorced from his first wife in Schuyler County, N. Y., about November, 1860, prior to his marriage to claimant. The first wife, Mary C., filed an application for pension on May 14, 1897. It was shown that the soldier had been married to each of the claimants.

It will be observed that the second wife based her title to pension, not upon a presumption, but upon the alleged fact of divorce. The evidence adduced not only failed to establish the alleged fact of divorce, but went beyond that, and established the fact, beyond question, that the soldier had not obtained a divorce as alleged. It will be remembered that the soldier and both of the wives lived in the State of New York. The courts which had jurisdiction in divorce proceedings were well known. That was known to the claimant, Samantha, as is indicated by the fact that she fixed the county in the State of New

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York in which, it was claimed, that the divorce had been obtained. The custodian of the records of the courts which had jurisdiction appeared as a witness and denied the existence of any record of divorce proceedings. The first wife also appeared as a witness, and testified that the soldier had never, at any time, obtained a divorce from her. It is certainly difficult to conceive how any better evidence could have been obtained to establish the fact that no divorce had been granted. The claim of the second wife, therefore, did not turn upon the question of presumption, but upon a question of direct and positive evidence. Disputable presumptions yield to evidence, and the second wife, Samantha, lost her case on the evidence adduced. Disputable presumptions are secondary to proof and vanish before established facts. It will be noticed that the second wife in her application did not rely on a presumption, but rested her title upon an alleged fact to be proven by competent evidence. Her declaration lifted her claim beyond the domain of presumptions.

Your communication contains the following statement:

> This Bureau rejected the application of Mary C. Orr—the first wife—based upon an opinion of the chief of the Law Division that the facts considered, in the light that all presumptions of law are in favor of the validity of the ceremonial marriage. * * * a divorce can be presumed to have been granted the soldier from the claimant, Mary C., and that Samantha Orr can be considered the soldier's legal widow.

There could be no objection to that proposition in the absence of evidence to overcome such presumption, but the evidence, hereinbefore mentioned and fully recited in the decision of the Department, completely destroyed that presumption. The evidence offered by Samantha in support of her declaration that a divorce had been obtained was not only insufficient, but would have been inadmissible in any judicial proceeding. That evidence amounted to nothing more nor less than an attempt to establish a judicial record by hearsay evidence; to establish the existence of a solemn decree of divorce by the evidence of a constable who had read the decree, not as it appeared upon record, but in the hands of a lawyer.

The courts of Schuyler County, N. Y., which have jurisdiction in divorce matters, are presumed to make a record of such proceedings which import verity, and that such records remain in the keeping of the proper custodian for the protection of all parties at interest. It would be a very strange and anomalous thing, therefore, to accept the memory of a constable as the depository of a solemn judicial proceeding. The ruling, therefore, that "Samantha Orr can be considered the soldier's legal widow" was clearly erroneous, for the reason that it was tantamount to the proposition that a presumption in favor of a second marriage would overcome direct and positive proof that no divorce had been granted. If a presumption carried

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that force, then evidence would have no place in a contest between two applicants, each claiming to be the widow of the same soldier.

It is further said, in your letter of the 5th instant, that:

> In both decisions it is assumed that the two marriages of each soldier are sufficiently proven. In both cases it is held that the fact of the divorce from the first wife is not established by the evidence.

I respectfully call your attention to the fact that the second sentence above quoted contains an erroneous statement. In the Orr case it is held that the evidence shows that the soldier was not divorced from the first wife. In the Germain case it is held that there was no competent evidence of that character, and, for that reason, the presumption in favor of the second marriage prevailed. In the Orr case the presumption yielded to direct and positive evidence, but in the Germain case there was no evidence to destroy the presumption. In that lies the plain and manifest distinction between the two cases.

The evidence in the Orr case, which was relied upon as going to show that a divorce had been granted, did not amount to proof of the averment and should be eliminated from the case for the purpose involved in this comparison; and that in the Germain case, which tends to show that no divorce had been granted, should be treated in like manner, since it is affected with the same infirmity.

In the case of Mary C. Orr there was only one material issue presented by the appeal. It is therein stated as follows:

> The sole and only issue presented by this appeal is, then, whether the soldier is shown by the evidence to have been divorced from his first wife, Mary C., prior to his marriage to Samantha, or at any time.

That, indeed, was the sole and only material question in the case, and it was so stated in the decision.

There is an obiter dictum in the Orr case to the effect that no presumption could arise, and, if so, it would be no stronger in favor of the first than of the second marriage, which might properly be the subject of criticism, but that question was not involved as a material issue in the case and, therefore, lacks the force of adjudication. A dictum is defined by Bouvier to be "An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication." If the second wife, Samantha Orr, had been given the benefit of any presumption, it would have availed her nothing, for the reason that the direct and positive evidence in the case overcame and destroyed any favorable presumption which might have arisen.

In a comparison instituted between the two cases above mentioned, all mere dicta should be eliminated and the investigation should be confined to the material questions at issue, and, if found to be harmonious in that respect, there can be no substantial variance. There was,

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therefore, no principle adjudicated in the case of Mary C. Orr which is in conflict with any ruling in the case of Louisa C. Germain.

In view of the time that has elapsed since the rendition of the decision in this case, September 14 ultimo, prompt promulgation thereof is directed.

Approved:

E. A. HITCHCOCK, *Secretary.*

DISLOYALTY—EVIDENCE—PRESUMPTIONS—SECTION 4716, R. S.

JOHN H. KIMBALL.

Volunteering to build larger stockades for the better accommodation of Union prisoners was not volunteering to aid the rebellion.

The record showing the transfer of a Union prisoner to Colonel O'Neill, rebel recruiting officer, will not raise a presumption of an enlistment in the Confederate Army, but is sufficient to raise a presumption of aiding and abetting the rebellion, but the proof in this case showing that claimant neither enlisted in the Confederate Army nor performed service of any kind in aid of such rebellion, such presumption of aiding and abetting the rebellion against the authority of the United States is rebutted, and the decision in this case of October 10, 1900, is not in conflict with the cases of Milo Ousterhout (7 P. D., 270); Russel S. Cole (4 P. D., 141); John S. McCoy (5 P. D., 369); William Hedgspeth (1 P. D., 245), and Charles F. M. Guernsey (11 P. D., 64).

Assistant Secretary F. M. Campbell to the Commissioner of Pensions. November 22, 1900.

Herewith are returned the papers in the above-entitled case, together with the departmental opinion therein, dated October 10,1900, and your communication, not dated, in which you ask for further instructions in regard to the scope of said opinion.

You suggest that the said decision is practically in conflict with the opinions in the cases of Milo Ousterhout (7 P. D., 270), Russel S. Cole (4 P. D., 141), John S. McCoy (5 P. D., 369), William Hedgspeth (1 P. D., 245), Charles F. M. Guernsey (11 P. D., 64), and John W. Strange, Docket No. 49,899.

The first vital question to be disposed of in the Kimball case was. Did Kimball enlist in the Confederate Army?

The record did not show him enlisted, he denied enlistment, and there was no evidence of any nature whatever showing an enlistment. The record did show him "transferred to Colonel O'Neill, rebel recruiting officer," and he admitted such transfer, explaining it in such a way as to negative any presumption that the transfer was an enlistment. It was therefore held that the evidence, record or otherwise, failed to show enlistment, and failed to raise a presumption of enlistment.

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As to such a conclusion being in conflict with the decisions in the cases cited by you, your attention is invited to the following in regard thereto:

In the case of Hedgspeth, supra, the record showed that Hedgspeth took the oath of allegiance to the Confederacy, and he admitted that he enlisted in the Confederate Army.

In the case of Cole, supra, Cole admitted that he took the oath of allegiance to the Confederacy, and the evidence showed, and Cole practically admitted it, that he enlisted in the Confederate States Army.

The McCoy case, supra, does not touch upon enlistment in the Confederate States Army, and will be referred to later on in this communication.

In the Ousterhout case, supra, the record shows that Ousterhout enlisted in the Confederate States Army and was captured in arms against the United States.

In the Guernsey case, supra, Guernsey admitted that he enlisted in the Confederate States Army and performed duty therein.

In the Strange case, supra, the evidence showed that Strange enlisted and served in the Confederate States Army for at least four months.

In each of the above cited cases it is seen that enlistment in the Confederate States Army is shown as an actual fact, save in the case of McCoy. In the Kimball case enlistment is not shown, and the distinction between the Kimball case and the others referred to is so obvious as not to merit discussion.

All facts accepted as proved are not necessarily proved in the same manner; but there is a vast difference between a fact actually proved and another fact accepted as proved by reason of presumption. It appears, in your comparison of the Kimball case with the others referred to by you, that you wholly fail to distinguish between a fact actually proved and a fact not proved, but presumed by reason of actual proof of other facts. In none of the cases referred to was there any question of presumption. The cases disclosed an actual proof of enlistment or service in the Confederate States Army. In the Kimball case, as stated, there was no fact of enlistment proved, and it was held that the bare record of transfer to Colonel O'Neill was not, per se, enough to warrant the presumption of enlistment.

The second vital issue in the Kimball case was, Did Kimball aid and abet the rebellion notwithstanding the fact that he did not enlist?

Of all the cases cited by you the one of John R. McCoy (5 P. D., 369) is the only one which bears upon such an issue. In said case McCoy did not enlist, but it was shown that he performed guard duty under Colonel O'Neill, and such was enough to warrant a holding of aiding and abetting the rebellion.

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In the Kimball case it was held, and properly so, that a volunteering to build larger stockades outside of Andersonville, for the better accommodation of Union prisoners, was not volunteering to aid and abet the rebellion; and furthermore, the evidence showed Kimball never was allowed to do the particular act that he expressed his willingness to do.

It may be remarked that the law is directed to those who "voluntarily engaged in, or aided or abetted the late rebellion against the authority of the United States." The Department has held, and adheres to it, that an enlistment in the Confederate Army, or a taking of the oath of allegiance to the Confederate States, establishes, prima facie, an aiding and abetting of the war of the rebellion. It holds, in the Kimball case, that a transfer to Colonel O'Neill, rebel recruiting officer, per se, is not sufficient proof to warrant a presumption of an enlistment in the Confederate States Army; but it also holds, inferentially, that such a fact is of so suspicious a nature as to raise a presumption, not of enlistment, but of aiding and abetting the rebellion. Such presumption may be rebutted, and it was so rebutted in the Kimball case.

There appears to be no reason to modify the departmental decision of October 10, 1900, in the Kimball case, in any particular. No new general principles are laid down; but, on the contrary, the general principles governing such cases, as exemplified in the Ousterhout case, are in express terms rigidly adhered to.

Your attention is especially directed to the following quotation from yours of no date, found on page 4:

> While the decisions of the Department show somewhat divergent views upon other questions connected with this subject, earlier decisions being overruled in the Ousterhout decision, there has been no conflict of opinion or practice in treating a record of "transferred to Colonel O'Neill, rebel recruiting officer," as equivalent in legal effect to a record of enlistment in the Confederate Army.

If the practice is correctly stated in the above quotation, such practice is wholly unwarranted, and is not a logical deduction from any of the cited cases of departmental decision. Nowhere, so far as it has come under the observation of the Department, has such a doctrine been announced, or such practice approved. The transferring of a prisoner to Colonel O'Neill, rebel recruiting officer, is not "equivalent in legal effect to a record of enlistment in the Confederate Army," and after a careful search such a doctrine is not found to have been enunciated in any departmental decision. Such a transferring is so suspicious a circumstance as to raise a presumption of aiding and abetting the rebellion—not, however, by enlistment—and if such a transfer was not satisfactorily explained in all particulars, would be fatal to a claim by reason of section 4716, R. S.

In conclusion, and in order that no further misapprehension may

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occur, you are advised that this Department adheres to the doctrine that an enlistment in the Confederate States Army is presumed to be voluntary, and is, prima facie, an aiding and abetting of the war of the rebellion. It adheres to the conclusion of law that a transfer of a prisoner to Colonel O'Neill, a rebel recruiting officer, is not, per se, sufficient on which to base a presumption of enlistment. It adheres to the conclusion of law that a record of the transfer of a prisoner to Colonel O'Neill, rebel recruiting officer, is sufficient to raise a presumption of aiding and abetting the rebellion, and that such presumption will attach until rebutted by evidence of such a character and nature as is sufficient to overcome the presumption.

If proper distinction is made between a fact actually proved, and a fact presumed by reason of other facts proved, the Kimball case will be seen to harmonize with the cases referred to by you, and will enable other cases of like nature to be readily decided under the law.

MARRIAGE AND DIVORCE—EVIDENCE.

CARRIE PETERSON (WIDOW).

Claimant's marriage to the soldier is shown by evidence of a ceremony and cohabitation. The only evidence of his prior marriage is the testimony of his sister and a friend, to whom he wrote or disclosed that he had married a girl in a seaport while he was pursuing the occupation of a sailor. His mere declaration, without other proof, is not competent to establish such a marriage to the prejudice of the rights of this claimant, and, on this point, her legal widowhood is considered established.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, November 23, 1900.

Carrie Peterson, widow of Gustaf Peterson, late of Company A, Thirty-sixth Illinois Infantry, filed her applications (No. 449,917) August 13, 1890, and September 28, 1891, for pension under the act of June 27, 1890. The claims were rejected June 9, 1898, on the ground of the claimant's inability, though aided by special examination, to prove that she is the legal widow of the soldier, the evidence failing to show whether soldier and former wife were divorced or whether she was dead or alive at the date of claimant's marriage to the soldier, and because of nondependence at date of filing claims. From this action appeal was taken September 15, 1898, by the attorney of record, upon the contention that the same was error and not justified by the facts.

Touching the first ground of rejection the material facts appear to be as follows: The soldier was in the service about one year in 1864 and 1865. He died May 9, 1883, being accidentally drowned. The soldier and claimant were natives of Sweden, but never knew each

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other until about three months before their marriage, January 28, 1866. He told her he was a single man, had never been previously married, and had been a sailor for fifteen years before coming to the United States, which was just before his enlistment in the Army. The claimant had been twice married before her marriage to the soldier; first to Peter Nelson, about 1844 or 1845, and next to Louis T. Walters, in 1865. The former died in 1851, and the atter about six months after his marriage to claimant, in the same year. By Nelson claimant had four children, two of whom are yet living. She also had an illegitimate son about 1854. She came to the United States about 1861. She had no children by Walters or the soldier.

The facts above stated are very well established by the evidence. The evidence showing that soldier had been married prior to his marriage to claimant consists of the statement of his sister and a letter from one Nils Sjoberg, of Stora Dalby, Sweden. The former, Johanna Peterson, deposed as follows:

I first knew Gustaf Peterson when he was a child. He was my brother in Sweden, and he lived there while I saw him till he was 21 years old; then he went out as a sailor, and was a sailor about six years before he came to America, or till he left Sweden for good. He was two years younger than I was. Then I didn't see him until 1881, when I came to America. My brother wrote home to us in Sweden that he was married to a girl named Gertrude Elmendorf, in Rotterdam. I don't know what country that is in, but he wrote he was married to her soon after he left Sweden the last time, when he was about 27 years old; but I never heard what became of his wife. He never said anything more about that wife—whether she lived or died. He never said and I don't know anything about her, except that my brother wrote us at home that he had married that girl.

This sister of the soldier furnished the name and address of Sjoberg, as being a friend of her brother who would probably know the facts as to his prior marriage and what became of the first wife. His letter in response to official inquiry is as follows:

Gustaf Peterson was not married in Sweden, but, without doubt, in Rotterdam, Holland. I have written to his brother-in-law and sister, to the address below, but do not know whether she is alive or dead.

Here he gives the address of Jonas Petterson, or Peterson, husband of the sister whose statement is above quoted. This Jonas Peterson was seen by the special examiner, but knew nothing of the alleged former wife of the soldier. And, as appears from the above testimony, neither the soldier's sister nor Sjoberg knew anything of such former wife except what they were told by soldier. Such evidence, being nothing more than the declaration of the soldier himself, is not competent to prove that he was actually married, as stated. There is no proof of a ceremony or of cohabitation, and while the soldier's assertion of such marriage might have been used as evidence against him in a proper proceeding in which he was directly interested or could be affected, can not be used to the prejudice of this claimant.

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Her marriage to the soldier is shown by positive evidence of a ceremony and subsequent cohabitation. She had no notice or knowledge of a previous marriage of the soldier. On the contrary, he assured her that he had not been married before, and, as far as his own declarations go, this one offsets those made to the sister and friend. Furthermore, the presumption of innocence and of the validity of the marriage to claimant obtains, and if there was such a former marriage by soldier as the testimony indicates, the presumption also holds that the former wife was dead or divorced before he was married to claimant. This case is governed by the rulings in the recently published decision, dated September 14, 1900, of the appeal of Louisa C. Germain (11 P. D., 66), and claimant's title to pension, as far as her legal widowhood is concerned, is considered established. That portion of the ground of rejection which held her legal widowhood not established is accordingly reversed.

SERVICE—ACT JUNE 27, 1890—BEATY'S INDEPENDENT SCOUTS.

RUSSELL STEPHENS.

The act of July 14, 1870, for the relief of Captain Beaty's Company of Independent Scouts was manifestly passed to enable deserving members thereof to obtain the benefit of pension laws then in force for disabilities incurred in the service and line of duty, and its scope can not be broadened to include the essentially different conditions of title to pension contemplated by the act of June 27, 1890, and claimant never having been legally mustered into the United States service and honorably discharged therefrom is not pensionable under said last-mentioned act. Citing case of James Threet (9 P. D., 297).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, November 23, 1900.

Russell Stephens, formerly a soldier in Captain Beaty's Independent Company Tennessee Volunteer Scouts, appeals from the action of your Bureau on February 25, 1895, rejecting his claim for restoration under the act of June 27, 1890.

He was originally pensioned at $12 per month commencing August 25, 1890, on account of rheumatism and disease of heart. On May 24, 1893, after due notice, and consideration of testimony in rebuttal, his name was dropped from the rolls on the ground that pensioner did not serve ninety days in the military service of the United States during the war of the rebellion. Testimony filed in rebuttal not sufficient to warrant any change in action. Subsequently in declarations filed on August 15, 1893, and March 13, 1894, claimant applied for restoration to the rolls, both of which applications were rejected on February 25, 1895, on the ground of no title, claimant not an enlisted man in the United States service as shown by the records of the War Department.

Subsequently, on October 9, 1897, and February 4, 1898, claimant

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filed declarations for restoration to the pension rolls, and on June 30, 1898, he was informed by letter from your bureau that his latter declaration does not warrant a change of action.

On September 29, 1898, he filed his appeal, contending that he was a regularly enlisted soldier in a company fully recognized as a United States company and part of the United States service, viz, Captain Beaty's Independent Company Tennessee Volunteer Scouts, and served for ninety days and more, and that by special act of Congress on July 19, 1870, said company was regularly mustered into and out of the service, and recognized as a part of the military service of the United States and paid for their services and granted honorable discharges.

The records of the War Department as furnished herein on December 12, 1889, state the following as to the service record of claimant and the standing of his said company:

There is but one roll of Capt. David Beaty's Independent Company of Scouts (Fentress County, Tenn.) on file in this Department, and that is a duplicate of the roll made out in 1870 by certain parties in Tennessee, assisted by Captain Beaty, to meet the requirements of the act of July 14 of that year, which recognized the company for pay and pension. Upon that roll Russell Stephens is reported as a private enrolled January 25, 1862, at Jamestown, Fentress County, Tenn., and discharged June 1, 1865, with remark: "Never absent from company." Soon after the acceptance of the said roll (in 1870) as a part of the official records of the Department, it was reported that numerous frauds had been perpetrated in making up said roll and securing payment thereon. Whereupon, by direction of the Secretary of War, First Lieut. Wm. H. Clapp, Sixteenth Infantry, was furnished with a copy of the company roll and sent into Fentress County, Tenn., where the company was raised, with instructions to carefully investigate the claim of each member. In Lieutenant Clapp's official report of his investigation of the claims dated August 18, 1871, opposite the name Russell Stephens appears the remark: "Served a little in 64 and 65." Nothing additional bearing upon this case.

Because of the nature of the records as to service, a special examination was held in December, 1894, giving claimant full opportunity to furnish proof of service. This examination was held under his application for restoration, and claimant stated at its close that he was satisfied and had no further evidence to offer.

Claimant and his wife and son and four witnesses testified. The claimant stated that to the best of his knowledge he joined the command the first of 1862, and was discharged when peace was made in 1865. Was with the command the most of his time, but could not say just how long. Of course was with it over 90 days. Thought fully five months. In answer to direct questions he responded that he joined the command in the first part of 1862, did not remember what month, stayed with it a year and maybe over, then went home sick and staid away a month or six weeks; after this sickness went back to his command and stayed with it until peace was made; that is the only time he was away from the command.

Claimant's wife stated that her husband served in Capt. David

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Beaty's company, and she thinks he went in about corn-pulling time in 1862, and remained with the company until peace was made. He was at home once in a while all the way through the service.

Claimant's son, David G. Stephens, stated that he was 48 years old; that he and his father served in Beaty's command; that his father went in some time in 1862, a while before witness joined. Could not state exactly, but thought claimant went in the last of 1862 or first of 1863, and served until the war was over; could not say how long witness himself was in the command, only that he went in the last of 1862 or first of 1863, and stayed until after peace was made. That the men would disperse and go home a few days at a time, then come together, but the command never disbanded until after the war.

Claiborne Beaty stated that he was second lieutenant in said company; that he was unable to give the dates of enlistment and discharge; his recollection was that claimant joined either at time of organization or shortly afterwards, and was sure he was with them in 1863, 1864, and 1865. Would say he served two or three years. He was sick along in 1863, or 1864, at his home. Did not remember where the command was at that time. He was away a good long time.

G. W. Conatser stated that all he could say as to claimant's service during the war in Captain Beaty's company, was that he saw him in that command and was on scouts with him. Was not a member of that command, but when at home would at times be with Beaty's men. Thought claimant was a member of Beaty's command. Knew he was with them but could not say as to enlistment and discharge. Remembered his being with Beaty in 1864, and frequently after that time, but could not say about his being with them before that.

George W. York stated that he and claimant were in Captain Beaty's command together, but could not tell dates of enlistment and discharge; that they were away a few times when they had permission.

In an affidavit filed herein on April 15, 1891, the claimant states that his service commenced sometime in the early part of 1864 and ended in 1865. This corroborates the finding above quoted of Lieutenant Clapp.

By a statement from the Treasury Department filed herein on October 14, 1891, it appears that claimant was paid from January 1, 1862, to June 1, 1865, forty months and six days, by Treasury certificate No. 577314, issued January 19, 1871, but this can not be accepted as evidence of service beginning January 1, 1862, for claimant; his wife and son and other witnesses herein fix the time he entered service as corn-pulling time in 1862, in the latter part of that year, or the first of 1863.

The testimony in this case has been thoroughly reviewed and carefully considered. It is vague, indefinite, and in parts conflicting, and no ground appears for disturbing the findings of your Bureau.

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Moreover, in the similar case of James Threet (9 P. D., 297), it is held that pensionable title under the act of June 27, 1890, is predicated upon service actually rendered for ninety days or more, while the service of these men was so broken and questionable in every way that no certain character can be attributed to any of it, and that—

The members of Captain Beaty's company of Independent Scouts never having been legally mustered into the United States service, are not pensionable under the act of June 27, 1890, notwithstanding the act of July 14, 1870, recognizing said organization as a part of the military force of the United States and granting them pay and pension on making proof of actual service.

This special act for the relief of Captain Beaty's scouts was manifestly passed to enable deserving members to obtain the benefit of pension laws then in force for disabilities incurred in service and line of duty, and its scope can not be broadened to include the essentially different conditions of title to pension which are contemplated by the act of July 27, 1890.

Under the ruling quoted and the evidence in the case the action appealed from was clearly right, and is hereby affiirmed.

MARRIAGE AND DIVORCE—CALIFORNIA—EVIDENCE.

RACHEL J. SEBASTIAN (WIDOW).

In the absence of consent the mutual assumption of marital rights, duties, and obligations can not, under the statutes of California, constitute marriage.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. November 30, 1900.

This appellant, Rachel J. Sebastian, on May 8, 1896, filed a claim, No. 633410, for pension under the act of June 27, 1890, as the widow of Robert M. Sebastian, who was a member from December 28, 1864, to September 29, 1865, of Company A, Seventh Kansas Cavalry, and died March 6, 1896.

Said claim was rejected in November, 1897, on the ground that claimant's marriage to said soldier was subsequent to the approval of said act, and she appealed June 30, 1898, contending that she contracted a valid marriage to the soldier prior to the approval of this act, and that the second ceremonial marriage to him, June 20, 1895, was merely to conform to the requirements of a law, approved March 26, 1895, amending the code of the State of California, where they resided.

The laws here referred to are as follows: Section 55 of said code declared that—

Marriage is a personal relation arising out of a civil contract to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization or by a mutual assumption of marital rights, duties, or obligations.

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Said act approved March 26, 1895, amended this section by striking out the last clause, making the section read that consent, in order to constitute marriage, "must be followed by a solemnization authorized by this code."

And section 57 of said code, reading as follows:

> Consent to and subsequent consummation of marriage may be manifested in any form and may be proved under the same general rules of evidence as facts in other cases.

was likewise so amended by said act of March 26, 1895, as to read:

> Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases.

Section 75 of said code provides that—

> Persons married without the solemnization provided for in section 70 must jointly make a declaration of marriage showing substantially

four enumerated facts. Section 77 provides that such declaration shall be acknowledged and recorded as are grants of real property, and section 78 provides that on refusal by either party to execute such declaration, the other party may institute an action to have the validity of such marriage judicially declared.

It is manifest that under this code prior to March 26, 1895, a common-law marriage was both valid and legal, and the supreme court of that State held, in the case of Hinkley *v.* Ayres (105 Cal., 357), that where no prior illicit relations existed and parties have—

> held themselves out as man and wife, and (have) lived together as only married persons could lawfully do, this presumption which prevails everywhere, of marriage, is especially strong here where marriage may be constituted by consent and subsequent assumption of marital rights and duties and where such consent and assumption may be manifested in any form and may be proved under the same general rules of evidence as facts in other cases.

The rule is, the court says further, that—

> parties must live together as husband and wife, treat each other in the usual way with married people, and so conduct themselves as to have full repute among their intimates, friends, and associates to be husband and wife.

And this is, they say, the settled construction and meaning of the term used in the code, "a mutual assumption of marital rights, duties, or obligations," citing Sharon *v.* Sharon (79 Cal., 633); White *v.* White (82 Cal., 427); Kilburn *v.* Kilburn (89 Cal., 46); and People *v.* Beevers (99 Cal., 286). See also, in re Ruffino (116 Cal., 304), and Norman *v.* Thomson (121 Cal., 620), the latter decision construing the act of March 26, 1895, and holding that section 55 of the code as amended by that act requires, in order to constitute a valid marriage, not only the consent of competent parties but subsequent solemnization of marriage by a person specified in section 70 of the code, said act sweeping away, they say, "the easy process of marriage" by filing declaration, as provided in section 75.

And in the case of White *v.* White (supra), the court held not only

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that marriage was, under these provisions of the code prior to March 26, 1895, as at common law, presumable from cohabitation and repute, but that it was so presumable from continued cohabitation and repute following removal of an impediment, although the parties had commenced such cohabitation illicitly prior to removal of the impediment. The question in the latter case, the court says, is merely one of fact for a jury to determine from all the evidence; whether the presumption arising from the fact of the illicit commencement of the cohabitation, viz, that such illicitness continues until lawfulness of cohabitation is proved, be regarded as a presumption of law or as one of fact.

The facts in this case, principally as testified to by claimant, are as follows:

On December 2, 1869, this claimant was ceremonially married, in California, to Thomas B. Kelly, who was a member, during the war of the rebellion, of Company I, First California Cavalry, and died June 10, 1882.

In the fall of 1884 she became acquainted, she says, with one Robert M. Sebastian, whom she knew as a married man, but separated from his wife. In August, 1885, after he and she talking the matter over, she says, and on his promise to marry her as soon as he got a divorce from his wife, she and said Sebastian began living together as man and wife. She was induced to do this, she says, by a desire to get her children (by Kelly) out of the orphan asylum and with her, and as she was very poor and said Sebastian was a good talker, and she came to think a great deal of him.

She continued to cohabit with said Sebastian ostensibly as his wife, she says, being so introduced around by him, and so accepted and regarded by the community and by her family (all of whom were ignorant of his first wife) until October, 1892, when she left him because of his bad treatment of her said children and refusal finally to marry her, although his wife had secured a divorce from him March 18, 1890.

In view of the fact that she and said Sebastian had lived together as husband and wife after said divorce, they executed papers, she says, soon after she left him in October, 1892, acknowledging that they had never been married, and that she had never regarded herself as his wife, and releasing both from all obligations.

This agreement, signed by claimant and filed herein, recites that, whereas R. M. Sebastian and Rachel J. Kelly have been living together as man and wife, and have two children, are desirous of separating and living apart, and have joint property in the name of said Sebastian: therefore, in consideration of the delivery to her of his deed to certain property described, she releases him "from all liability to her whatever, either for damages or otherwise," and accepts same "in complete settlement of all damages or claims sustained by the said Rachel J. Kelly by reason of her cohabitation with the said R. M. Sebastian."

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This agreement is dated February 3, 1893. On July 10, 1893, she filed a claim, No. 579930, for pension under the Revised Statutes, as widow of said Kelly, which claim was rejected in September, 1895, on medical grounds; the legal approval being that pension if allowed thereunder should terminate under the act of August 7, 1882, because of the claimant's adulterous cohabitation with said Sebastian, in violation of that act.

Her minor children by said Kelly were in February, 1898, allowed pension, certificate No. 462105, under the act of June 27, 1890.

She and said Sebastian had, she says, parted amicably in the fall of 1892, and he continued to call on her and wanted her to return to him. She refused to do so, however, though in the fall of 1894 he boarded at her house, which she allowed because of the affection existing between him and his two children by her, born June 14, 1886, and June 30, 1890.

On June 20, 1895, they were ceremonially married, because, she states in an affidavit filed in the appealed claim, of the passage of the act of March 26, 1895, above mentioned, and of the inducements of her friends, although "she always believed," she says, "that her contract marriage (which was, she asserts, on his divorce in March, 1890, from his first wife) was good and lawful."

All of the above facts as to claimant's relations with Sebastian prior to the year 1895 were testified to by her in January, 1895, on special examination of her claim as widow of Kelly. She then testified positively that no one, not even her own folks or her children by Kelly, knew or yet knows that her cohabitation with Sebastian prior to 1895 was illicit; and she then stated to the special examiner that she would relinquish her claim for pension rather than bring public disgrace upon herself and children by an exposure of the facts, and earnestly requested him to protect them from publicity.

That no others knew or know of the true nature of claimant's and Sebastian's relations prior to 1895 appears to be true. Her two sisters and brother-in-law and six other intimate acquaintances testify that no question whatever has ever been raised as to claimant's good character since the death of Kelly, or as to her relation with Sebastian not being truly matrimonal. They had left claimant's home for another town with the expressed intention of getting married there, and on their return said they had been, and were accordingly so recognized thereafter. Sebastian had not been long known in that locality, and all except one sister of claimant state he was not known to have been married before; this sister stating that claimant merely told her that he had been previously married.

And said Sebastian himself, on special examination at that time, testified that no others beside claimant knew of his having a former wife, who was in the northern part of the State, and of whose application for

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a divorce he did not know until sometime after the decree. He alone was to blame, he said, for claimant coming to live with him illicitly, as she relied on his promise to procure a divorce from his first wife and marry herself; that he always thought he should and always intended to marry claimant, but merely kept putting it off; and that he still intended to marry her because he had never noticed a thing wrong with her and she had always borne and still bore a good reputation.

Upon these facts the claimant contends that a common-law marriage between herself and Sebastian should be presumed to have been contracted subsequent to his divorce from his first wife on March 18, 1890, and prior to the act of June 27, 1890, a marriage prior to the passage of that act being a precedent condition of title thereunder.

It is a well-settled rule of law, as it is a natural inference of fact, that cohabitation begun illicitly is to be presumed to continue illicitly; and subsequent lawfulness of any such cohabitation must be established either by direct proof or by favorable presumptions.

In this case the only direct proof as to a lawful marital relation between claimant and Sebastian is that of their formal marriage in June, 1895. There is no satisfactory proof that prior to that time and subsequent to March 18, 1890, when he for the first time during their cohabitation became competent in law to contract marriage with another than the one from whom he was then divorced, there was, in fact, any actual consent to marriage between him and claimant, nor is any consent to marriage prior to June 20, 1895, naturally or reasonably inferable from the facts shown.

On the contrary, the admissions both of claimant and of said Sebastian show there was prior to June 20, 1895, in fact and reality no consent of present marriage between them.

Their agreement of February 3, 1893, shows they did not at that time consider themselves husband and wife. Consent, therefore, is not presumable, and in the absence of consent the mutual assumption of marital rights, duties, and obligations can not, under the statutes of California, constitute marriage, for the statutes expressly prescribe both these factors as necessary constituents of marriage.

It is clear from the evidence herein that claimant and Sebastian were not married prior to June 27, 1890. She has therefore no pensionable status under the act of that date. Rejection of her claim as his widow is affirmed accordingly.

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FEE. NO FUND.

ANNIE C. CASHNER (WIDOW).
W. H. ROSSER (ATTORNEY).

Where there is no fund from which a fee can be paid, action refusing to certify a fee is proper.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, November 30, 1900.

W. H. Rosser, of Millhall, Pa., on July 27, 1900, entered an appeal from the action of the Bureau in the matter of fee on the issue of April 22, 1898, in the claim under the general law of Annie C. Cashner, now Zellers, as widow of Michael Cashner, Company B, Ninety-seventh Pennsylvania Volunteer Infantry.

Mrs. Zellers, as the widow of the above-named soldier, was a pensioner under the general law at the time of her remarriage, February 25, 1890, and had been paid pension to December 4, 1889. In her behalf, on March 26, 1898, the appellant filed a declaration for payment to her of pension from December 4, 1889, to the date of her remarriage, certificate issued April 22, 1898, for this purpose. No fee was certified to Mr. Rosser for his services; hence this appeal.

It appears that the entire pension was paid to Mrs. Zellers. She has been requested by the Bureau to refund ten dollars, that the same may be paid to appellant, but she has not complied with this request.

There is no published case directly in point. It appears, however, that the Bureau has exhausted all legal means to correct the error that it has made, and no fund has been secured from which a fee can be certified to the appellant. He contends, in substance, that a fee should be certified to him, whether there is any pension due or to become due to Mrs. Zellers. It is only necessary to say that there is no fund at the disposal of the Commissioner of Pensions from which the fee can be certified. It has been held that—

As but one fee can be certified on each issue to allow pension in a claim where an attorney refuses to refund a fee which was erroneously paid him, action refusing another fee to the attorney entitled to the one so paid is proper. (Case of John A. Burgess, 9 P. D., 170.)

In the case cited the claimant was in receipt of current pension; other material facts are recited in the rule. In this case no payments of pension are to be made and no fee has been certified. In both cases the power of the Bureau to recover the money which should have been certified to the attorneys of record has been exhausted. The action of the Bureau in refusing to certify a fee to the appellant was proper.

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FEE AGREEMENTS—ATTORNEYS—MINORS.

MINOR OF HENRY ELBERSON (CLAIMANT).

JAMES F. RUSLING (ATTORNEY).

A claim for pension under the general law in behalf of one as minor child of a soldier, when antagonistic to a claim in behalf of others as minor children of the same soldier to whom the entire pension has been paid, is an original claim for pension within the meaning of the act of July 4, 1884, and when valid fee agreements are filed in such a claim the law directs that they shall be recognized.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. November 30, 1900.

James F. Rusling, of Trenton, N. J., on May 31, 1900, entered an appeal from the action of the Bureau in the matter of fee on the issue of September 29, 1899, in the claim for pension under the general law, of Emma F. Elberson (now Bennett), as minor child of Henry Elberson, deceased, who served in Company G, Eleventh New Jersey Volunteer Infantry.

On January 11, 1867, certificate issued under the general law to allow pension to William H. and Hope Elberson as minor children of the soldier. The younger of said children, Hope D., attained her sixteenth year on December 8, 1877, on which date payment of pension ceased.

On January 15, 1897, the appellant, in behalf of Emma F. Elberson (now Bennett), filed a declaration for pension as minor child of the soldier by his first wife. The child's birth is alleged as on September 5, 1855, and her mother's death on February 22, 1858. Appellant filed January 15, 1897, articles of agreement for a fee of $25, and subsequently filed the evidence adduced in the claim.

Certificate issued September 29, 1899, to allow pension to the claimant as a minor child of the soldier. On said issue the appellant was certified a fee of $10. On appeal he contends for the allowance of a fee of $25, under said articles of agreement.

The Bureau refused to recognize the fee agreements upon the ground that the claim was not one of such difficulty and trouble as to warrant the recognition of fee agreements, nor an original claim for pension.

In the case of Samuel W. Frink, deceased (35 Fee P. L. Bk., 139, certificate No. 30295, decided January 31, 1900, the Department held that—

A claim for pension under the general law in behalf of one as minor child of a soldier, when antagonistic to a claim in behalf of others as minor children of the same soldior, to whom the entire pension has been paid, is an original claim for pension within the meaning of the act of July 4, 1884, and when valid fee agreements have been filed therein, the law directs that they shall be recognized.

The facts in the case under consideration are like those arising in the case cited in all essential particulars. In said decision the Depart-

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ment stated fully the reasons why claims for pension of the class described are original claims for pension.

It is urged by the Bureau in this case, as it was formerly urged in the case cited, that the claim in behalf of a child, when its share of pension has been paid to other children of the soldier, is proceedings in the claim for pension of such other children. I am of the opinion that it has been clearly stated why this view can not be entertained. In fact, I can assign no more reason for designating the claim of such a child as a part of the claim of such other children under the conditions set forth than could be assigned for calling said proceedings a part of a claim in behalf of children who, in fact, were not the children of the soldier, but who had been allowed pension as his children. In the report of the Bureau it is stated that an injury to the claimant is inflicted should a fee of $25 be certified. The question is purely a legal one, and it is not presumed that the law is unjust. From a moral point of view it would hardly be urged that the payment of a fee of $25 to Mr. Rusling for the services he has rendered this claimant would be unjust or inequitable.

With more reason in its support the Bureau suggests that there can be but one original claim in behalf of the minor children of the soldier. The question is, what proceedings in this case constitute the original claim, those instituted in behalf of the children, William H. and Hope D., tinctured with fraud as they were, or the proceedings instituted in behalf of this claimant? Were the question to be determined from these facts alone, I should unhesitatingly say that the latter constitutes the original claim as for all purposes in the matter of fee. However, considering both proceedings as parts of the same claim and together constituting the original claim, it follows that a fee should be certified to the attorney on whose shoulders there rests no charge of practicing a deception on this Government. If, as the Bureau states, it was at fault in not taking the necessary steps to preclude the fraud that was perpetrated, it follows that it would have been error to have certified a fee on the first issue in the claim when pension was paid to the guardian of the minor children, Hope D. and William H. This being true there is no reason why the Bureau should not certify a fee to the attorney who presented all the facts in the case and such fee as he would be entitled to for prosecuting an original claim for pension in accord with his contract with the claimant. Action reversed.

PATHOLOGICAL SEQUENCE—CHRONIC ASCENDING NEURITIS.

ENOCH ALEXANDER.

Appellant is now pensioned at $36 per month on account of a gunshot wound of left leg and resulting total disability of same. The right leg is also shown to be totally disabled and it is claimed by the appellant to be a result of the condition of his left leg.

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It is satisfactorily shown that the total disability of the left leg was caused by a chronic ascending neuritis, produced by the gunshot wound, and that the disease has crossed over and involved the right leg, and the disability resulting from said neuritis is such as would warrant the allowance of a higher rate of pension than he now receives. Action reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 5, 1900.

Enoch Alexander, formerly a private in Company C, Twelfth Indiana Volunteer Infantry, and in Company G, Twenty-second Veteran Reserve Corps, is a pensioner under the general law at $36 per month on account of a gunshot wound of left leg and resulting total disability of same. Certificate is numbered 15162.

There is shown to be total disability of both legs, and the pensioner is, in consequence thereof, helpless.

He appeals, March 11, 1899, from the refusal of the Bureau to accept the condition of his right leg as a result of the gunshot wound of the left leg.

Pension was originally granted August 10, 1863, at $4 per month, but his name was dropped from the rolls because he again entered (drafted) the military service, September 20, 1864; but pension was subsequently restored at $2 per month, and the rates were subsequently increased from time to time until the present rate of $36 was allowed. This last allowance was based upon a certificate of a board of examining surgeons, dated April 13, 1887, which showed that the wounded leg was totally disabled and the Bureau decided that this disability resulted from the wound.

The character of the wound and the nature and history of the disease as revealed by the record and certificates of medical examination in the case, which have been accepted by the Bureau as the cause of the total disability of the left leg, are as follows:

The missile entered the leg about its middle and remained therein, as shown by the surgeon's certificate of disability upon which he was discharged from his first service.

This certificate shows that he was found to be—

Incapable of performing the duties of a soldier because of gunshot wound of the left leg received at battle of Richmond, Ky.

The ball entered on the outside of the limb and posterior to the fibula and passing down between the fibula and tibia, from which place it has not been extracted. The limb is swollen and painful and can not be used without the aid of a crutch, not able to march or do any efficient military duty. Disability one-half.

The first certificate of medical examination in the case is dated April 25, 1863, and is as follows:

The above-mentioned wound must have been done by a nearly spent ball entering the muscles of the left leg, then passing downward about 3½ inches and lodged posterior to the tibia. The injury is imperfect motion of ankle.

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He was next examined April 24, 1876, when the surgeon reported—

This man received a ball in the outer part of the calf of left leg, the ball entering behind the bones without touching either of them, and is still lodged in the leg. He thinks it lies 3 or 4 inches below the point of entrance, and says in walking it produces soreness and pain in the tendo Achillis. The limb is of full normal size as the right and presents no appearance of weakness. Wound has never opened or suppurated since it finally healed in 1863. General health tolerably good.

The certificate of the next medical examination is dated May 1, 1878, and states:

Ball entered on outer aspect of left leg at union of upper and middle thirds just in front of gastrocnemius, where it appears to be encysted. Complains of pain in limb on much walking. Judiciously pensioned.

When next examined, June 9, 1880, the board certified that the soldier "complains of pain in walking, especially in the ankle. Slight atrophy."

A rate of $6 per month was allowed from the date of this certificate. The next medical examination was made January 12, 1881, when the examining surgeon found—

* * * the gastrocnemius muscle is contracted and the heel is raised about 2½ inches from the floor when the patient walks, his body being sustained with the ball of the foot. * * *

On April 5, 1882, when next examined, the surgeon certified to the following conditions:

The ball entered about the middle of, and a little back of center of lower leg in the belly of the muscles. The ball still remains just below, and owing to the amount of tenderness just below and as far down as the ankle I would judge that the ball is pressing on the nerve. He is unable to put the heel down at any time, especially in the act of walking. The scar is about 2½ inches long by 1 inch wide. He complains of "great numbness from the knee down to the foot."

The rate was increased to $8 per month from the date of this certificate.

The next examination was made March 7, 1883, when the board reported—

There is contraction of the tendo Achillis. He walks on the front part of the foot with the heel 2 inches from the floor. * * * Claimant says the appearance of the leg has not changed, but that he has more pain.

On February 20, 1884, when next examined, the board found—

Muscular atrophy with contraction of tendo Achillis, and the heel is 1¾ inches from the floor. The limb measures 1 inch less in diameter at belly of gastrocnemius than the well leg at a corresponding point. We are unable to locate the ball, but think it took a downward course. There is some loss of tactile sense on outer side of leg and considerable loss of muscular power. He complains of great pain in the limb and is quite lame in walking. * * * There is loss of motion in foot from muscular contractions and adhesions.

From February 18, 1885, his rate of pension was increased to $12 per month, based upon the findings in a certificate of examination of

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said date. The board making this examination expressed the opinion that—

The ball is probably pressing on the popliteal nerve or its branches.

The board also found atrophy of muscles of the leg and stated the soldier moves the limb with evidences of pain and in an awkward manner.

On June 9, 1886, when next examined, the board certified:

The temperature of the left leg is lower than that of the right. Patellar reflex wanting in left, right normal. Ankle clonus left side wanting. Muscles of left leg soft and flabby.

From the date of this certificate a rate of $16 per month was allowed, and from the date of the next medical examination, November 24, 1886, a rate of $24 per month, third grade, was allowed.

The certificate made on this latter date showed:

All the muscles of thigh and leg are atrophied and flabby. The heel is elevated by contractions of tendo Achillis 1½ inch. Head of femur is partially dislocated upward and backward leaving the trochanter quite pronounced, with apparent shortening of the whole limb of 3½ inches. Nerves of sensation are normal, but moter nerves seem paralyzed. Patellar reflex is greatly diminished on left side, normal on right. General health appears good. In our opinion the dislocation of hip is due to paralysis of muscles of thigh.

He is unable to walk without crutches. The whole disability is the result of gunshot wound of leg. * * *

The next certificate of examination in the case is the one on which the allowance of $36 per month was based, and is dated April 13, 1887.

The board making this examination certified:

* * * The limb is cold to touch, and the muscles are soft and flabby, with considerable atrophy, being from 1½ to 2 inches smaller than its fellow. Pelvis tilted upward on paralyzed side (trochanter major is quite prominent, making an apparent shortening of the limb of 2 inches.

There is entire loss of power, but no anchylosis in any of the joints. Sensation is partially lost only. There can no use be made of leg or foot in walking or standing. There is total disability of entire limb.

General appearance medium. Mental condition good. Heart normal, but nervous in action.

Special senses: V=10/20 per Snellen; hearing, 5/8. Tongue protruded straight; speech normal.

Tendon reflex decreased. Ankle clonus absent. Skin slightly anæsthetic. In spine find nothing abnormal except a slight acquired curvature in lumbar region. Nutrition only fair.

All the thoracic and abdominal organs are healthy.

The ball has never been extracted, so he says, but can not be found or located by board. The paralysis is confined entirely to the left limb, and in the opinion of the board, in absence of any other discernible cause, is due to reflex irritation, caused by wound.

This progressive disability of the leg, which the Bureau has determined was caused by the gunshot wound is, from the symptoms described in the various certificates of medical examination, clearly a

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chronic neuritis involving the great sciatic nerve and its branches, starting probably in the posterior tibial excited by the pressure of the missile, as stated by the examining surgeons in April, 1882, and February, 1885. This disease is known as chronic ascending neuritis.

The issue in this case is whether the disease continued to progress, until it crossed over to the right leg and caused the total disability of said leg, as contended.

On March 17, 1894, the soldier, while in receipt of the present rate of pension of $36 per month, filed a declaration in which increase was claimed "on account of the right leg becoming affected and resulting in total disability of same."

It does not appear that there was an adjudication under this declaration; that is, there is no record on a face brief to this effect, although he was medically examined on July 2, 1894, when the examining surgeon found complete paraplegia, and expressed the opinion that same was the result of the gunshot wound of the left leg.

In a declaration for increase filed March 17, 1896, the pensioner alleged that he believed himself to be entitled to increase of pension on account of gunshot wound of left leg resulting in total disability of same, and that said disability had affected the nerves of the lumbar region, causing total disability of the right leg in December, 1893.

He was examined under this claim on May 7, 1896, when the examining surgeon reported as follows:

On examination of gunshot wound of left leg, I find cicatrix 8 inches below knee joint on surface of leg. Cicatrix is 1 inch in length by three-fourths inch in breadth; is adherent to fascia beneath only. There is considerable loss of tissue about cicatrix. This leg measures 13 inches at point of injury, while the opposite measures 14½ inches. I am unable to locate the ball and can not find evidence of its exit. There is no evidence of injury to bones, which are easily outlined on account of atrophy of muscles. Claimant is unable to move either limb or stand up. Muscles are soft and flabby in each and give every evidence of not having been used for a long time. He is unable to tell how many points are touching him at a distance of 4 inches apart in either limb from hips down. I find no tenderness over any part of spine, lumbar, or sacral region. I am unable to account for this paralysis. There is no evidence of specific trouble or vicious habits. He is especially well nourished and evidently enjoys good health aside from paralysis.

There is no evidence of rheumatism. There is a slight catarrh of nose and throat, but no worse than is found in the average person in this climate. He hears ordinary conversation at 6 feet with either ear; membrana tympani in each ear healthy.

There is no organic disease of heart found to exist. Area of cardiac dullness and point of apex normal. Rhythm regular.

No evidence of spinal irritation save paralysis of the legs.

Claimant has total disability of right leg as well as left. I am unable to say whether the paralysis is due to gunshot wound or not. * * * As to why he is unable to travel to board, would say that his only method of traveling is in a hand-cart which he works with his hands and is able to wheel himself all over town. I see him at the post-office (just across the street from where the board meets) almost every day, but presume he is unable to climb stairway.

There is little the matter with claimant aside from paralysis of lower extremities, for which he requires an occasional attendant or "periodical."

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By medical action taken December 2, 1896, increase was rejected and the paralysis of the right leg denied as a result of the pensioned cause. Subsequent to this action the pensioner filed on many occasions much testimony with a view of having the claim reopened, but in each instance this was refused, such refusal being based upon the statement of the medical referee contained in various slips filed with the papers in the case, to the effect that there is no pathological connection between the disability for which pensioned and the condition of the right leg.

The reasons for this holding are not set out in any paper filed with the case.

Prior to the date of the last slip in which this opinion is expressed the pensioner was afforded the benefits of another medical examination under special instructions prepared in the medical division of the Bureau.

This examination was made May 11, 1898, by a member of the board of examining surgeons of Kokomo, Ind., who reported in reference to his condition and the causes leading thereto, as follows:

He goes about the street in a wheeled chair which he propels with his hands. In the house he has a rocking-chair which he hitches along with his hands, one side at a time, the chair pushing the feet along. There is a linear cicatrix on the outer side of the left leg, shown on diagram. This scar is an inch long, vertical, depressed, adherent, dragging, not tender. There is no special induration of tissues in calf. I can not locate the missile. The injured leg is an inch less in circumference at point of injury than the other. There is a very slight petella tendon reflex in both legs, *very* slight. No deformity of back or spine. There are numerous marks of cupping of back. The nervous system seems to be unaffected from hips upward.

Arms not paralyzed. Auscultation and percussion reveal no abnormal condition, organic or functional, about the heart. The history of the case indicates that the wound of left leg together with subsequent suppuration and cicatrization did injury to nerves and caused continued irritation, which gave rise to ascending neurotic derangement, which finally resulted in paralysis, first of left leg; afterward, the morbid process involving and destroying power in right leg. It looks like a case of progressive ascending paralysis. The same etiological factors concerned in causing the paralysis of the left leg no doubt operated to cause paralysis of right leg. This condition is described by Ranney, Westphal, Rosenthal, and others. And while they do not specifically include trauma as a cause, they are so uncertain about the cause that I think a long-continued suppuration as followed this wound might produce it. It requires some faith, but I am inclined to think in this case the gunshot wound of left leg caused the paralysis of both legs. The bladder and rectum are not paralyzed. He has absolutely no power to use either leg; can not move even a toe. Has not the slightest voluntary motion in either foot or leg, therefore can not stand or walk alone. Can dress and undress imself and can feed himself, doing these things with hands alone. When weather is good and he is otherwise well, can wheel himself to closet; can drag imself upon seat by his hands, and then attend to calls of nature. But if he falls and is not within reach of his chair or some other object by which to pull himself up, he is helpless, only by crawling with his hands and dragging his hips and legs along. In icy weather, or when there is snow, he can not go about with any safety to attend the calls of nature. From these facts it will be seen that he requires, probably, the regular aid and attendance of another person.

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This examining surgeon concludes that the case looks like a case of progressive ascending paralysis, and that the same etiological factors concerned in causing the paralysis of the left leg no doubt operated to cause paralysis of right leg; that he is inclined to think the gunshot wound did involve the nerves and set up the ascending neuritis. He names medical authorities who have described the condition, yet said authorities do not specifically include trauma as a cause. However, the bureau has already accepted the paralysis of the left leg as a result of the wound, and in so doing has, ipso facto, accepted neuritis as the cause of the paralysis, because there could have been no other pathological condition which would have brought about like results under like conditions and circumstances.

It being clearly established that ascending chronic neuritis affecting the sciatic nerve was the cause of the total disability of the left leg, and that said disease was caused by the wound, it only remains to be determined whether or not the neuritis ceased its progress upon reaching the sacral plexus or spinal cord, or passed over and involved the nerves supplying the right leg, either through the spinal cord (causing a transverse myelitis) or by passing along the communicating branches of the sacral plexus to the sympathetic. The history of the case shows that the disease did cross over by one or the other route, more probably by the latter, as there has been no paralysis of the rectal or vesical sphincters.

The manifestations of the involvment of the cord shown by paralysis of the left arm (same side as the wounded and paralyzed leg) in December, 1893, the time at which the paralysis of the right leg developed, as stated by the claimant and his physician, did not long continue, and were evidently caused by irritation of the cord when the lesion reached the sacral plexus. However, there is nothing to show that the loss of use of the right leg was due to any other cause than an extension of an ascending neuritis, and he history presents nothing unusual. Practicing physicians are called upon to treat just such cases, while authors of medical text-books mention this tendency of the disease.

Bartholow says in his Treatise on the Practice of Medicine, of this affection—

It is important to note that when inflammation occurs in a nerve, it may extend from the point first diseased upward (neuritis ascendens) or downward (neuritis descendens). By the extension of an ascending neuritis the spinal cord may be ultimately affected.

He further says that the cause of neuritis may be wounds, injuries, and the transference of the morbid action from neighboring inflamed tissue.

Dr. Morton Price says (Disease of Spinal Cord-Dercum)—

By some, chronic myelitis is thought to be the direct sequel of an ascending neuritis.

Osler says—

A neuritis limited at first to a peripheral nerve may extend upward—the so-called ascending or migrating neuritis—and involve the larger nerve trunks, or even reach

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the spinal cord, causing subacute myelitis. * * * The inflammation may extend to the other side, either through the spinal cord or its membranes, or without any involvement of the nerve centers, the so-called sympathetic neuritis. (The Principles and Practice of Medicine.)

Erb, in treating of diseases of peripheral cerebro-spinal nerves, says—

Those cases are more intelligible in which inflammation creeping along the nerves from the periphery—neuritis ascendens—can be clinically or anatomically demonstrated, and which ultimately reaches the spinal cord and produces myelitis, the result of which is paraplegia.

And again, in reference to inflammation of nerves, he says—

A point of special importance in reference to the course of neuritis and to the whole form and complexion of many particular cases of disease is one noticed by various observers, namely, the disposition of the neuritis to propagate itself along the nerve in a centripetal direction and to extend to nerves lying at a higher plane, and even to the spinal cord. Earlier observers—Rokitansky, Froriep, and others—had already admitted such a centripetal mode of propagation of neuritis. Wier Mitchell also attributes to neuritis a great disposition to extend centripetally. Leyden is inclined to refer the myelitis occurring after affections of the urinary and other pelvic viscera to a lumbo-sacral ascending neuritis, extending to the spinal cord, and Remak also regarded the paraplegia occurring in such cases as being due to lumbo-sacral neuritis. (Cyclopædia of the Practice of Medicine, Ziemssen.)

It would then appear that there is sufficient authority for concluding that an inflammation of the nerve may ascend and cross over to the opposite side and cause the conditions shown in this case.

The contention of the appellant is regarded as well based; in fact, there appears to be no reason whatever to ascribe this pensioner's condition of paraplegia to any cause other than as an extension of the diseased process from the left leg, which has been, as before stated, accepted by the Bureau as due to the gunshot wound of that leg.

The medical examination made July 2, 1894, first after filing his claim for increase, in which he alleged that his right leg had become useless by reason of the pensioned causes, shows that he was then suffering with absolute paralysis of both legs, and, of course, this condition is one in which a higher rate of pension than he now receives is warranted.

The Department, therefore, directs that this claim be readjudicated and increase allowed, as indicated. Action reversed.

MARRIAGE AND DIVORCE—EVIDENCE—PRESUMPTIONS.

MARY M. A. WOOD (WIDOW).

The claimant being unable to prove, by the testimony of personal acquaintances, that she was never married prior to her marriage to the soldier, or to furnish any evidence of the death of the soldier's first wife, except a sworn statement made by the soldier himself less than a year before his death, but all the known facts, as well as the presumptions of law, being favorable to the validity of her said marriage, it is held to have been a valid marriage.

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Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 5, 1900.

Herewith are returned the papers in the appealed pension case (No. 630087) of Mary M. A. Wood, alleged widow of Matthew Wood, deceased, formerly a soldier in Company K, Thirty-eighth Pennsylvania Infantry. It appears that the said Matthew Wood died on the 21st of January, 1896, and that he was, at the time of his death, a pensioner under the provisions of section 2 of the act of June 27, 1890. The appellant, on March 11, 1896, filed a claim for the accrued pension due him at the time of his death, and also a claim for pension under section 3 of the aforesaid act, as his widow. Both claims were rejected in August, 1898, on the ground that she was unable to prove that she was the soldier's lawful widow. From that action she appealed on September 19, 1898, contending that her title as the widow of the soldier has been fully established.

There is no dispute as to the fact that the claimant and the soldier were married, by a minister of the gospel, at Lawrenceville, Pa., on July 2, 1868, there being a cotemporaneous record of said marriage made by the officiating minister, a duly certified copy of which has been filed. Nor is it disputed that the parties subsequently lived together as husband and wife, and held themselves out as such, and were so reputed among their neighbors and friends, up to the time of the soldier's death—a period of more than twenty-seven years. The legality of the marriage is questioned solely upon the ground of her inability to furnish satisfactory evidence upon two points:

1. That she had never been married prior to her marriage to the soldier.

2. That a former wife of the soldier was dead at the time said marriage occurred.

Upon the first point she can furnish nothing but her own affidavit, for the reason, as she says, that she has no relatives and had but few acquaintances in the place where she and the soldier were married, having lived there only about a year, and does not know of anyone who could testify that she had not been married before. It should be stated that she has for many years lived in California, thousands of miles from the places where her early life was spent.

In regard to the death of the soldier's first wife, there has been filed a paper purporting to have been subscribed and sworn to by the soldier himself on April 5, 1895, in which it is stated that his said first wife died on April 14, 1865, in Alleghany City, Pa. This statement is made on a printed form which appears to have been prepared by the attorneys in this case with a view to obtaining from ex-soldiers certain data which might be useful, in case of the death of such ex-soldiers, in establishing claims for pension by their widows or dependent relatives.

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The part of the paper material to the present consideration reads as follows:

Full name of wife: Mary Maud Ann Woods.
Her maiden name was Norman.
Where married to her; city or village: Lawrenceville; *County* ——; State, Pa.
Date of marriage to her: July 2, 1868.
Name of minister or magistrate performing the ceremony: Rev. Wm. P. Tenbroeck.
Name of church where marriage took place (or of which the minister was pastor): Rector St. John's Church.
If any prior marriages of either one, soldier or his wife, state them, and where the record can be found of death or divorce of prior husband or wife: My first wife, Emma Hart, died April 14, 1865, in Alleghany City, Pa.

After a careful examination of this paper I see no reason to doubt that the written statements therein responsive to the printed queries were subscribed and sworn to by the soldier on April 5, 1895, as represented.

It appears that no record of deaths was kept in Alleghany, Pa., in 1865. The case therefore stands thus: The claimant swears that she was never married prior to her marriage to the soldier; the soldier declared, under oath, in 1895, that his first wife died in 1865. No direct evidence corroborative of either statement can be furnished.

It may be stated, as a general proposition, that the law always presumes in favor of the validity of a marriage unless the contrary is clearly shown. If the celebration of a marriage be proved, the contract, the capacity of the parties, in fact, the validity of the marriage is presumed. (Stewart on Mar. and Div., sec. 125.) So, if a second marriage is proved, the dissolution of the first marriage by death or divorce may be presumed. (Ib., sec. 126.)

And, generally speaking, the burden of proof is upon those who assert the invalidity of a marriage and not upon those who assert its validity and claim its benefits. But this rule, which obtains in suits at law involving the rights of contesting parties, is of little value in the adjudication of pension claims, for the reason that in such cases there are not, ordinarily, two contesting parties, but only one party claiming certain benefits under the law, and upon that party rests the whole burden of proving everything necessary to establish his or her title to the benefit claimed. The question with which we are concerned in this case, therefore, is not as to where the burden of proof lies, for it necessarily lies upon the claimant, but whether the evidence adduced is sufficient to entitle the claimant to recognition as the widow of the soldier in the allowance of pension.

The amount of evidence which may properly be required in such a case is manifestly that which would justify a careful and prudent man in paying out money intrusted to him for the benefit of certain designated persons. He must be reasonably sure that he is paying the proper person, for if he is not he may be called upon to pay it over again.

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Where a claimant seeks pension as the widow of a soldier it is a proper and reasonable rule which requires that she shall show not merely the fact of her marriage to said soldier, but also whether either of them had been previously married, and if so, the dissolution of such prior marriage by death or divorce. It was so held by the Department in the case of Mary A. Reynolds (8 P. D., 287) and Mary J. Stocker (9 P. D., 506).

It does not follow, however, that the same kind and amount of evidence of no prior marriage, or of the dissolution of a prior marriage, is necessary in every case. Regard must be had for circumstances, and claimants should not be required to perform impossibilities. All that can be reasonably required in any case is that the claimant shall furnish the best evidence of which the circumstances admit, and that the evidence, viewed in the light of such circumstances, shall leave no apparent reason to doubt that she is the true widow of the soldier on account of whose death she claims pension.

The claimant in this case has given seemingly valid reasons why she can not furnish the testimony usually required in such a case. She has sworn that she was never married prior to her marriage to the soldier. Her statement is certainly entitled to some weight. It is consistent with all known facts. The evidence shows that she was only about 22 years old at the time of said marriage. There is less probability of a previous marriage in such a case than there would be in the case of an older woman. The church record shows that she was married under the name of Norman. The soldier stated in his affidavit that Norman was her "maiden name." The soldier's affidavit as to the death of his first wife is also entitled to some degree of credit. It is not to be assumed that he would have sworn falsely, nor is there any reason to suspect that he committed bigamy. The presumption is that he did not. It is worthy of note, in this connection, that he was married to the claimant in the same locality in which he had lived with his first wife. A man about to enter into a bigamous marriage would probably have gone to some place where he was not known.

In addition to the ordinary presumption, which obtains in favor of every marriage, and the circumstances above named which tend to strengthen such presumption in this case, there is the weight to be attached to the fact of the long continuance of the marriage relation—until the death of one of the parties—and to the fact that nearly five years have elapsed since the soldier's death, during which no other person has appeared claiming to be his widow.

In view of all these facts it appears to me that the chances that the appellant's marriage to the soldier was invalid are so slight that they may be safely disregarded. In the case of Mary C. Buckley (8 P. D., 195) the claimant's marriage to the soldier in 1877 was shown by record evidence, and she lived with him as a wife from the time the

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ceremony was performed until his death in 1884, and bore him four children, who survived the soldier. Applicant was never married prior to her marriage with the soldier and no evidence appeared in the case tending to show that the soldier was ever previously married, but all the witnesses stated that they never heard it intimated that he had been previously married, but prior to this marriage he represented himself to be a single man, and they believed this and had no reason to believe otherwise. Upon this showing of facts Assistant Secretary Reynolds held that a legal marriage between the claimant and the soldier was proved. See also the decision in the case of America Hooker (8 P. D., 210).

For reasons above stated I am of the opinion that the legality of the soldier's marriage to the claimant in this case should be admitted. The action of the Bureau is accordingly reversed.

DECLARATION—ACT JUNE 27, 1890—COMMENCEMENT.

MARY J. FISK (WIDOW).

Pension under section 3 of said act can commence only from date of filing of declaration subsequent to the soldier's death, and a declaration executed by the wife prior to his death is null and void.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. December 5, 1900.

This appellant, Mary J. Fisk, in June, 1898, was allowed pension, certificate No. 465877, under the act of June 27, 1890, as the widow of John Fisk, who was a member, from June 24, 1861, to August 16, 1865, of Company F, Fourteenth Massachusetts Infantry and of Company M, First Massachusetts Heavy Artillery, and died January 20, 1897, pension commencing December 8, 1897, date of filing claim subsequent to his death.

On October 11, 1898, she filed this appeal, contending that the pension should commence from the date of his death, because she then had pending under said act a claim, filed December 16, 1896, for pension as his widow (such claim resting upon an alleged presumption of his death by reason of absence, unheard of, for many years), which was rejected in August, 1897, on the ground that his death could not be presumed, because he is shown to have been alive October 13, 1893, when he was examined under a claim filed by him in August, 1891.

This contention by the widow can not be sustained. By the express terms of the act of June 27, 1890, under the provisions of which this pension is allowed, the pension must commence from date of filing of declaration only, which must have been executed subsequent to the soldier's death. The declaration of December 16, 1896, was null and

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void. A wife has no pensionable status on account of her living husband's service, and can not execute a valid declaration for pension as his widow to take effect, as appellant contends, on his subsequent death, for a divorce from their marriage or her own death may intervene, so that she may never become his widow, and hence may never acquire any pensionable rights.

In order that a person may execute a valid claim for pension, there must be a present pensionable right of some kind to which claim may be made; as held in the case of a soldier who executes his declaration on the day of discharge, as in the case of William H. Hagarty (10 P. D., 359). It was held in that case that a soldier can not execute a valid declaration for pension so long as he is in the service, or until he is actually discharged therefrom, as until then the fact of his discharge, which is an essential element of his pensionable title (as is the fact of the soldier's death in the case of a widow), can not be alleged.

The commencement of pension herein was entirely in conformity with the law and is affirmed.

SERVICE—WAR WITH MEXICO—ACT JANUARY 29, 1887.

ALFRED WILLIAMS.

This soldier enlisted in the Regular Army of the United States on April 22, 1848, less than sixty days prior to the termination of the war with Mexico on May 30, 1848. Consequently his service during said war did not fulfill the requirements of the act of January 29, 1887, and he is not entitled to pension thereunder.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 5, 1900.

Alfred Williams, late a private, Company G, Eighth United States Infantry, was originally pensioned under the provisions of the act of January, 29, 1887, as a survivor of the Mexican war at the rate of $8 per month, which was subsequently increased to $12 per month, under the provisions of the act of January 5, 1893, and on September 22, 1894, he was, after due and legal notice, dropped from the rolls upon the ground that he did not serve in the Army of the United States for sixty days during the war with Mexico, as required by the act of January 29, 1887, to entitle him to pension thereunder.

On January 28, 1899, said soldier filed an application for restoration of his pension, which was rejected on April 4, 1899, upon the same grounds upon which he had been dropped from the rolls.

From this action appeal was taken on July 11, 1899.

The act of January 29, 1887, provides a pension for the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval services of the United States, who, being duly

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enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and such other officers, soldiers, and sailors as may have been personally named in any resolution of Congress for any specific service in said war.

The claim of this appellant for pension under the provisions of said act was based upon the allegation that he had served in the Regular Army of the United States for sixty days en route to and in Mexico during the war with that nation.

The official record of the appellant's service in the United States Army shows that he enlisted as a recruit for the Regular Army for a term of five years at Baltimore, Md., on April 22, 1848, was assigned to Company G, Eighth United States Infantry, and served therein until April 2, 1853, when he was discharged the service by reason of the expiration of his term of enlistment. Since the appellant enlisted and served in the Regular Army of the United States, it is apparent that his military service during the war with Mexico must have terminated with the termination of said war. It has long been held by this Department that the legal termination of the war with Mexico for pensionable purposes was May 30, 1848 (McClelland, Secretary, in re Michael Salmon, 3 L. B. P., 9; and in re Thomas Bruce, 4 L. B. P., 261; also Assistant Secretary Reynolds to Commissioner of Pensions, 7 P. D., 240), and since this date is less than sixty days subsequent to the date of the appellant's enlistment in the Army, April 22, 1848, the whole period of his military service in the Army of the United States during the Mexican war was necessarily of less than sixty days' duration.

It is not contended that the appellant was actually engaged in a battle in the Mexican war, or that he had been personally named in any resolution of Congress for any specific service rendered in said war; consequently it is manifest that his military service during said war, being of less than sixty days' duration, did not comply with the requirements and conditions of the act of January 29, 1887, and was not sufficient to give him any title whatever to pension under its provisions.

There is no parallel whatever between this case and the cases of Geiger (9 P. D., 28) and Young (Ibid., 44), referred to in this appeal. In both of said cases a period of more than sixty days elapsed between the date of the soldier's enlistment and the date of the termination of the Mexican war; in this case there was a period of but thirty-eight days between the date of the appellant's enlistment and the date of the termination of said war, so that by no possibility could he have rendered sixty days' actual military service in or during the Mexican war.

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It is, therefore, very evident that the original action by which this appellant was allowed a pension under the act of January 29, 1887, was erroneous and unauthorized by the law and that the subsequent action dropping him from the rolls and rejecting his application for a restoration of said pension upon the ground stated, from which this appeal was taken, was without error, and said action is affirmed accordingly.

RATE—COMPOUNDING RATES—GRADE RATES.

NIRAM W. MALLORY.

The claimant was pensioned at $17 per month for disease of heart.
Subsequently a reissue was made to include deafness, but no increase of rate was allowed.
The next higher rate to that which the claimant was receiving is third grade, $24 per month.
There is no authority of law under which specific rates and general rates can be compounded to make a grade rating.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 5, 1900.

Niram W. Mallory, deceased, Company D, Seventh Minnesota Volunteer Infantry, certificate No. 420732, was pensioned under the general law at the rate of $17 per month for disease of heart from August 7, 1889, when he filed a claim for increase, March 27, 1890, alleging increased disability from pensioned cause and new and additional disability from deafness of both ears, contracted at Selma, Ala., June, 1865. The claim was rejected July 15, 1892, on the ground of no increased degree of disability from pensioned cause, disease of heart, and no record of the alleged deafness and claimant's inability to furnish satisfactory evidence connecting the same with the service. The claim for deafness was reopened and allowed, and a reissue was made to include nearly total deafness of right ear and slight deafness of left ear, as an additional disability, at the rate of $17 per month, the former rate, from March 27, 1890. It is from this action that the recognized attorneys appealed September 20, 1898, contending that it is contrary to the evidence on file; that it is error to hold that the claimant's combined disabilities do not entitle him to a rating of at least $24 per month; and that to make a reissue to include the disability, deafness, and at the same time not allow any rating on account of it is very much like issuing a pension certificate that carries no payment of pension.

In discussing the additional rate of pension claimed under this appeal the sufficiency of the rate allowed for disease of heart, independent of any other disability, can not enter into the question, for the reason that the action appealed from is the refusal of the Bureau to combine the

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general rate, $17 per month, on account of disease of heart, and the specific rate, fifteen-thirtieths, on account of deafness.

The simple question before the Department is whether there is any authority of law under which specific rates and general rates can be aggregated or compounded to allow a grade rate.

In the case of Abram McCullum (6 P. D., o. s., 111) it is held that:

Unless specifically provided for, there is no provision of law by which disabilities can be considered separately and compounded so as to allow for all the pension which each, considered separately, would aggregate.

In the case of Michael Kelly (3 P. D., 240) the Department held:

Claimant was pensioned at the rate of $45 per month for the loss of a leg above the knee, and claims also for the loss of an eye, contending that he is entitled to $63 per month for the combined disabilities. There is no intermediate rate between $45 and $50 nor between $50 and $72, and the law does not allow the compounding of ratings for specific disabilities, thereby creating a special rate for a special disability: and to entitle claimant to a higher rate than $45 per month it must be shown that the combined disabilities have resulted in permanent total helplessness, requiring the personal aid and attendance of another person.

In the case of Albert Marshall (5 P. D., 226) it was held that:

The practice of the Department in determining pensionable ratings is governed not by a combination of separate ratings for separate disabilities, but by the sum total of the disability for manual labor. * * *

In the case of Mark Davis (10 P. D., 185) it was held that:

Pensioner was receiving a rating of seventeen-eighteenths for neuralgia and slight deafness of both ears, result of catarrh, said rating being made up of two-eighteenths for the first-named disability and fifteen-thirtieths (the schedule rate at time of allowance) for the deafness in that degree. Afterwards, when rating of four-eighteenths was allowed for additional disability from chronic diarrhea and piles, the total rating was continued at seventeen-eighteenths, because the ratings could not be combined to make twenty-one eighteenths, a rate unknown to the law. Then, again, the schedule rate for slight deafness of both ears has been reduced to six-thirtieths. This was recommended in the last certificate of result of diarrhea, and six-eighteenths for pains in stomach, chest, and head, result of neuralgia. Thus the combined rates, making eighteen-eighteenths, kept the total pension at the former rate of seventeen-eighteenths per month.

The ratings named could not be combined to make the third-grade rate, or $24 a month, even if they would amount to so much and as they do not altogether; and considered as a whole produce a degree of incapacity to perform manual labor equivalent to the loss of a hand or foot, pensioner is not entitled to said third-grade rate.

So in this case the claimant was pensioned at the rate of $17 per month for disease of heart, a general rate, and the claim for nearly total deafness of right ear and slight deafness of left ear was subsequently allowed as an additional disability, and the rating of $15 per month was made therefor, in accordance with the rates fixed by the Commissioner of Pensions.

The rate of $17 per month for disease of heart had been fixed and the claim disposed of by the Bureau action of July 15, 1892; and it is

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not contended that this rate was insufficient, but that the specific rating of fifteen-thirtieths should be added to the rate already fixed to make a grade rating.

As there is no authority of law under which specific rates and general rates can be compounded to make a grade rating, I am of the opinion that the action appealed from was proper, and the same is hereby affirmed.

MARRIAGE OF SLAVES—LAWS OF VIRGINIA.

FRANK FITCHETT (FATHER).

Claimant was one of four slaves who cohabited with one Melinda, also a slave, she bearing three of her pseudo husbands, including claimant, a child. The masters of Melinda and claimant refused to allow a ceremony of marriage to be performed.

Held: The connection between claimant and Melinda was illicit, the evidence showing that there was no mutual intent on their part to consummate a bona fida slave marriage.

The act of February 27, 1866, of the assembly of Virginia, referred only to such colored persons who had undertaken and agreed, bona fide, to occupy the relation to each other of husband and wife. Mutual intent was a sine qua non to a bona fide moral matrimonial relation between slaves.

The decision in the case of Daniel Bird (10 P. D., 105) is reaffirmed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 5, 1900.

Frank Fitchett, alleged father of Nathan Fitchett, formerly a private in Company B, Tenth United States Colored Volunteer Infantry, filed his declaration under the general law as amended by the act of June 27, 1890, on August 6, 1890, claim being rejected on May 9, 1898, on the ground that claimant had no status. An appeal was filed by attorney on September 3, 1898, which is so intemperate in its tone and phrases as to render it difficult to arrive at its assignments of error. It is believed, however, to contend that rejection is contrary to law.

The facts in the case are as follows:

One Melinda, a slave owned by William Cartan, and residing on his plantation in the lower end of Northampton County, Va., after living with two negroes and bearing each of them a child, commenced living with the claimant herein, who was then eighteen years of age, somewhere about the year 1850, and bore him a son named Nathan. Claimant lived on an adjoining plantation, and stayed nights with Melinda. They thus lived and slept together for the space of eighteen months by permission of their owners, who, however, refused to allow a ceremony to be performed, when the claimant's master removed to another portion of the county, and claimant ceased to cohabit with Melinda, who shortly after formed a connection with one Robbins, a slave, and died, as stated by witnesses, "long before the war." The

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son of claimant and Melinda went into the United States service during the war of the rebellion, and after discharge lived and cohabited with one Louisa Brickhouse, a married woman, until his death in 1886. Claimant is without property of any kind.

Upon the above state of facts Frank Fitchett asks that he be recognized, under the pension laws, as the dependent father of Nathan Fitchett.

While a slave was incapable of contracting a legal marriage (see Hall *v.* United States, 92 U. S., 27), yet slaves did, according to custom, contract marital relations so far as they were able, and such relation carried with it certain moral obligations and duties, which were clearly and well defined. Such a relation did, later on, in the slave States, by reason of remedial legislation, certain facts being shown, resolve itself into a legal marital status. (See Stewart on Marriage and Divorce, sec. 74, and cases cited.) Such a relation also did, in some slave States, and before emancipation, have a certain clearly defined legal status, based upon the moral obligation assumed by the parties when they entered into the matrimonial relation so far as they were able.

It is clear, from a careful study of the decisions in the various former slave States, as well as from facts of history not disputed, that slaves were allowed and encouraged to form bona fide moral matrimonial connections, such connection being evidenced by certain facts. These facts were, consent of the owner to the union, a ceremony by a negro preacher, the master, or the mistress, or some other suitable person, consummation of the matrimonial intent by cohabitation, and the recognition of such parties as quasi husband and wife by the white and colored persons of the adjoining country. Such slave marriages carried with them all the duties and obligations of the marital state so far as such duties and obligations were not inconsistent with a state of slavery; and mutual assent to be husband and wife was as obligatory, morally, upon the parties, as it was legally obligatory upon free persons.

It is not to be doubted for an instant but that the moral crime of adultery and fornication could be committed by slaves, the same as the same legal crime could be committed by free persons, and it is evident that not every slave negro and negress who slept together, and had children, were husband and wife.

It was held by this Department, in the opinion in case of Annie Hughes (8 P. D., 455), as follows:

> There can be no question but that slaves, in this quasi matrimonial status, could be guilty of an illicit relation, and that an illicit connection between a male and female slave could as well exist as the same relation could exist between a free male and female. It is the intent of the parties in such cases that is the governing factor. * * * Two things were of almost universal occurrence during slavery, when male and female slaves entered into a bona fide moral marital state, viz, the obtaining of the consent of the owners to such an alliance together with the celebration of some

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ceremony wherein the intent was expressed in a quasi public manner, indicative of the fact that the parties proposed from that date to sustain the moral marital relation (all that they were then capable of) of husband and wife.

Such propositions, as heretofore stated, are borne out by judicial decisions in the former slave States, as well as by history itself.

In the case at bar the evidence shows, and the claimant practically admits, that Melinda, the mother of the soldier, had lived with two negroes prior to living with claimant, and had had a child by each negro. She then, it appears, took the claimant, then a youth of 18 years, to her bed, and after living with him for eighteen months and bearing him a son the connection was broken off, and she espoused some one else.

All that the claimant and Melinda can be held accountable for, inasmuch as they were slaves, is the moral intent on the part of each, but such moral intent can be and should be sought for under the same rules and presumptions as would a legal intent, provided they were not slaves; and, practically, the same principles which would govern a common-law marriage are necessary to support this alleged slave marriage.

Let it be first noted that Melinda appears, by the evidence, to have lived as the mistress of two negroes, and had a child by each. She then takes up with claimant, who was but 18 years of age, with the knowledge of their masters, but, as claimant states, their masters would not allow a ceremony to be had. These facts show that one of the usual prerequisites to a bona fide slave marriage is absent in this case, viz, a ceremony according to custom. And this leads to the conclusion, a perfectly logical one in view of the facts, that while the masters were willing that those two slaves should sleep together, they were not willing that a bona fide marriage should be consummated. Such a withholding of permission to marry would seem to have been entirely proper and natural in view of the fact that the negress had previously sustained the relation of wife to two other negroes in the same section of country.

It may be remarked, as a safe declaration, that where two parties in slavery assumed the bona fide moral relation of man and wife, the intent and its natural consequences were of binding moral force upon the parties. The intent to remain as man and wife was incumbent upon them, save only as to those things which were incompatible with their state of slavery. When one of the parties was removed by the master to a distant portion of the country, and when access was physically impossible, the duties and obligations were severed. But when, as in the case at bar, one was only removed to another portion of the county, the marital duties and obligations were not sundered. In this case, however, claimant admits that upon his removal to a short distance, he went no more to see Melinda, and she took up another man.

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Such a condition of affairs points clearly to the reasonable deduction that there never was any intent on the part of either claimant or Melinda to form a bona fide slave marriage, as well as to the conclusion that their respective masters would not allow one to take place. The connection between Melinda and claimant was an illicit slave connection and lacks practically all of the elements of a slave marriage. This being true, it is unnecessary to discuss any pensionable rights that the claimant might have as being the putative natural father of the soldier Nathan.

Since the filing of the appeal the attorney has filed an amendment in which he calls attention to the act of February 27, 1866, of the general assembly of Virginia, and insists that the terms of such act put claimant in the position of the legal father of the soldier. The act in question is as follows:

1. *Be it enacted by the general assembly*, That the fourteenth section of chapter one hundred and eight of the code of Virginia for eighteen hundred and sixty be, and the same is hereby, amended and reenacted so as to read as follows, to wit:

2. That where colored persons, before the passage of this act, shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife and be entitled to the rights and privileges and subject to the duties and obligations of that relation in like manner as if they had been duly married by law, and all their children shall be deemed legitimate, whether born before or after the passage of this act; and when the parties have ceased to cohabit before the passage of this act, in consequence of the death of the woman or from any other cause, all the children of the woman recognized by the man to be his shall be deemed legitimate. (Passed February 27, 1866.)

It is apparent, without discussion, that this act was productive of two things: First, it fastened the status of husband and wife upon certain colored persons; and, second, it legitimatized certain children born of colored parents.

As to the first no one could be affected save those who were cohabiting together on February 27, 1866, and as Melinda was dead "long before the war," she could not be cohabiting on said date with the claimant.

As to the second, the condition precedent to the legitimatizing of the children referred to was that they should be the children of those who, before the passage of the act, "shall have undertaken and agreed to occupy the relation to each other of man and wife."

The sleeping together by a male and female, and the bearing of children by such female, do not constitute the relation of husband and wife. Such things are but links in the chain of facts which go to prove that persons are husband and wife. Mutual intent is a sine qua non in all cases; and, as has been seen in the earlier discussion herein, mutual intent was lacking in the case at bar. The act of February 27, 1866, therefore, is of no effect upon the status of claimant.

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The peculiar status of an alleged dependent colored father who claims by reason of a son born during the time that the claimant was in a state of slavery was fully discussed in the case of Daniel Bird (10 P. D., 105), and the principles enunciated in said case are applicable to the case at bar, save that the Bird case, supra, originated in Mississippi. The effect of sections 4702, 4704, 4705, and 4723, Revised Statutes, upon such a claimant, as discussed in said Bird case, are, however, fully relevant to the present case.

It can not be too strongly asserted, such assertion being based upon sound legal principles and deductions, that there is no law which authorizes the bestowing of a pensionable status as dependent father upon a former slave who was the natural father of male issue during slavery, because such male issue, later on, enlisted in the war of the rebellion. "The child was nullius filius; he had no legal father, and could take no rights under the law by being the son of the man who had begotten him." Whatever pensionable rights said child now has are bestowed upon him by statute. (See Bird case, supra.)

The mere fact that a common-law illegitimate child may have a pensionable right through his natural soldier father, under a statute to that effect, is no basis for conclusion that a natural father may have a pensionable right through his soldier son. Different beneficiaries under the pension laws stand upon various footings, and unless the law plainly and clearly bestows a pensionable right upon a person or class of persons, such persons have no pensionable status.

The decision in the case of Daniel Bird (10 P. D., 105) is reaffirmed. Action affirmed.

FEE—LIMITATION—DEPENDENT PARENTS—ACT JUNE 27, 1890, AND SECTION 4707, R. S.

KATHRYNE A. RATCLIFFE (MOTHER).

1. An applicant for a dependent parent's pension may, if he or she so elects, make and prosecute a claim under the provisions of section 4707, Revised Statutes, without regard to the provisions of section 1 of the act of June 27, 1890.
2. So much of the decisions in the case of Elizabeth Darling (10 P. D., 244 and 299) as denies the existence of such a right subsequent to the passage of the act of June 27, 1890, is overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 8, 1900.

Kathryne A. Ratcliffe filed on January 20, 1899, a claim for pension as dependent mother of Stephen M. Ratcliffe, late private, Company B, First Missouri Volunteer Infantry, who died while in the service, during the late war with Spain, on August 15, 1898. She appointed W. W. Dudley & Co., of this city, her attorneys, and they, on February 14, 1900, filed duplicate copies of an agreement on her

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part to allow them, in case the pension was granted, a fee of $25. The claim was allowed and a certificate issued to the claimant on July 16, 1900. The agent was directed to pay to W. W. Dudley & Co. a fee of only $10. From that action the attorneys appealed on August 6, 1900, contending that they should have been allowed a fee of $25 in accordance with their contract with the claimant.

Upon examination of the papers it appears that the fee agreements in this case were not properly executed in that the signature of W. W. Dudley & Co. to the same was not acknowledged before a notary public, or other officer competent to administer oaths, as required by law. This defect not having been cured prior to the adjudication of the claim the contract was void. (See the case of John S. Miller, 7 P. D., 347.) If there were no other question involved than the attorneys' right to a fee of $25 in this case the duty of the Department in the premises would be discharged by the dismissal of the appeal. Another and a much larger question has, however, been raised by a new or amended appeal filed by the same attorneys on October 5, 1900, the preliminaries to which require a few words of explanation.

The refusal of the Bureau to pay the fee stipulated for in this case was not based upon the informality in the execution of the fee agreements, but upon the ground tha the case was not one in which a contract for a fee in excess of $10 could be lawfully recognized. It was held that the claim was adjudicated under the provisions of section 4707 of the Revised Statutes as amended by section 1 of the act of June 27, 1890, and that section 4 of the last-named act prohibited the allowance of a greater fee than $10 in such a case. In effect the holding was that the claim was one under the provisions of the act of June 27, 1890. The attorneys contended on the other hand that the claim was made and prosecuted under the provisions of the Revised Statutes without reference to anything contained in the act of June 27, 1890, and that the limitation in section 4 of the last-named act as to fees in claims allowed thereunder had, therefore, no application.

In a similar case (Rosa Pedrotti, mother of Cipriano Pedrotti, Fee P. L. Bk., 35, p. 231) the Department held that, inasmuch as the pension secured was allowed under the provisions of the act of June 27, 1890, the law did not permit the certification of a fee in excess of $10 for attorneys' services, and that the action of the Bureau in allowing pension under said act instead of under section 4707, Revised Statutes, could not be reviewed under an appeal relating solely to the amount of the attorneys' fee.

With a view to making a direct issue before the Department, the attorneys in this case, on September 13, 1900, filed with the Commissioner of Pensions a request for a readjudication of the claim and allowance of pension under the provisions of section 4707, Revised Statutes. Their request was refused on October 3, 1900, the refusal

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being based on the ruling of the Department in the case of Elizabeth Darling, mother of Franklin Rickard (10 P. D., 244 and 299). From that action an appeal was taken on October 5, 1900, the grounds assigned being—

1. Error of law in holding that section 1 of the act of June 27, 1890, is applicable to a claim filed under section 4707, Revised Statutes, and in which all of the conditions required to give title under said section are fully established.

2. Error of fact in holding that under the decision of the Assistant Secretary of the Interior all claims of dependent parents filed subsequent to the passage of the act of June 27, 1890, are filed under section 4707, Revised Statutes, as amended by section 1 of the act of June 27, 1890.

It was held in the Darling case (supra) that the first section of the act of June 27, 1890, was simply an amendment of section 4707, Revised Statutes, and did not of itself convey any grant of pension. As a corollary of that holding it was further held that—

A claim, therefore, on behalf of dependent parents, when filed subsequent to June 27, 1890, is filed under section 4707 as amended. Claims should be filed under the granting act, which fixes the rate, and not under supplementary amendments, which do not affect the rate. (10 P. D., 346.)

Still more explicitly it was said, in a later ruling in the same case:

The phraseology of your inquiry would indicate that you are of the opinion that a dependent parent could file a claim subsequent to the act of June 27, 1890, under section 4707, as it existed prior to that date. Such I do not conceive to be the case, as by the very terms of the amendment of June 27, 1890, to section 4707, the pension can only commence from the date of filing the application; and so, under the provisions of section 2 of the act of March 3, 1879, their pensions, unless filed prior to July 1, 1880, must commence from date of filing the application. There would, therefore, be no period of time for which a dependent parent (not insane) could draw a pension prior to filing an application. * * *

To state the case in another form: All applications of dependent parents filed since June 27, 1890 (except in case of insane parents), are filed under section 4707, as amended, and there is no authority for filing a dependent parent's claim subsequent to June 27, 1890, under section 4707 as it existed prior to the amendment of that date, except in the case of insane parents.

While it is true that section 1 of the act of June 27, 1890, does not contain any express words of grant or fix any rate of pension, it can not be disputed that its effect was to authorize the allowance of pensions to a large class of persons who were not entitled to them under preexisting laws. If such persons are, by virtue of the provisions of said section, entitled to pensions which they would not have been entitled to otherwise, is it any misuse of language to say that pensions are allowed to them "under" the provisions of the act of June 27, 1890? If persons who have no title under section 4707, Revised Statutes, make application for the benefits of section 1 of the act of June 27, 1890, do they not, in effect, make application "under" said act? The act itself speaks of "pensions allowed to dependent parents under this act," and provides that they shall commence from the date of

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filing "the application hereunder." It will be observed, also, that the section referred to does not, as is usual with amendatory statutes, declare itself to be an amendment. It contains no reference whatever to section 4707, Revised Statutes.

In view of these facts it seems to me that section 1 of the act of June 27, 1890, should be regarded not strictly as an amendment to section 4707, Revised Statutes, but rather as additional legislation concerning dependent parents of soldiers and sailors.

Said section clearly contains no express repeal of anything in section 4707, Revised Statutes, and there can be no implied repeal unless the provisions of the two sections are repugnant, so that both can not stand and be executed together. I am unable to see that there is any repugnance. The manifest intent of the act of June 27, 1890, was not to take away any existing rights to pension, but to establish additional or alternative rights. The opening of a new and easier road to pension does not necessarily preclude applicants from taking the older and more difficult route if they conceive it to be to their advantage to do so.

It is conceded in the Darling decision (supra) that section 4707, in its original form, is still in force as to claims by or on behalf of insane parents. It is also in force as to all claims of dependent parents filed prior to June 27, 1890. If it is in force as to those classes of parents, it is in force as to any parents who may desire to claim its benefits and who are able and willing to comply with its requirements.

The actual pecuniary benefits to be obtained by proceeding under said action may be no greater than would be secured under the act of June 27, 1890—they may even be less—nevertheless the law imposes no restriction upon the applicant. If he (or she) for purely sentimental or fanciful reasons prefers to make and prosecute the claim under the older law, he has an undoubted right to do so. In the case of a soldier or a widow applicant this right is not questioned. Why should it be in the case of a dependent parent? It is by no means certain that the establishment of a claim under the provisions of old law rather than under those of the new may not at some time result in pecuniary benefit to the claimant. Such would be the effect, for instance, if the limitation upon the arrears act of March 3, 1879, should be repealed. But even if no substantial benefit could ever accrue, I find no authority for coercing the choice of a claimant to whom the law permits alternative courses of action.

It appears from the papers in the case now under consideration that the application of the claimant was in the form prescribed for an application by a mother under the provisions of section 4707, Revised Statutes. It further appears that she was called upon to furnish evidence of her dependence upon the soldier at the date of his death and of his contributions toward her support, as required by said section, and that she furnished such evidence. In other words, the papers show

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that the claim purported to be one under the law as it existed prior to June 27, 1890, and was so treated by your Bureau up to the point of adjudication, but is held to have been adjudicated under the provisions of the old law as amended by the act of June 27, 1890. It does not appear in what respect the adjudication would have been different had it been made under the old law as unamended, except in the matter of the attorneys' fee.

For reasons heretofore stated I am of the opinion that this claim should be regarded as having been made and prosecuted wholly under the provisions of section 4707, Revised Statutes, and as unaffected by anything contained in the act of June 27, 1890. If necessary, a readjudication should be made and a new certificate issued. So much of the decisions in the Darling case as denies the right of a dependent parent to file, subsequent to June 27, 1890, a claim under section 4707 as it existed prior to that date is hereby overruled.

It is not intended that this decision shall operate so as to permit claimants to be misled into making claims detrimental to their interests for the benefit of their attorneys. You are therefore respectfully requested, whenever an application for a dependent parents' pension shall hereafter be filed which does not specifically invoke the benefits of the act of June 27, 1890, to advise the claimant fully, before calling for evidence, as to his or her rights and privileges under both laws, with particular reference to the rate and commencement of the pension, if allowed, the proof required, and the fee which may be demanded by the attorney. Such applicant should then be given an opportunity to elect under which law the application shall be prosecuted. The same rule may be followed in regard to pending applications filed since June 27, 1890, in which the claimant's right to pension under the provisions of section 4707, Revised Statutes, has not been established.

COMMENCEMENT—SECTIONS 4730 AND 4713, REVISED STATUTES.

WILLIAM MCCLAIN.

Under the provisions of section 4713, Revised Statute , pension, if allowed, could only commence from date of filing the last material evidence necessary to complete the claim.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 8, 1900.

William McClain, of Company F, First Illinois Volunteers, Certificate No. 18190, Mexican war series, is pensioned under the acts of January 29, 1887, and January 5, 1893, at the rate of $12 per month.

He filed his original declaration under the general law May 5, 1886, alleging dislocation of right wrist in 1848. July 25, 1898, he filed

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another declaration alleging injury to wrist, arm, and hand, diarrhea, disease of digestive organs and rectum, and rheumatism. The claim was rejected August 5, 1899, on the ground of no record or other satisfactory evidence showing origin in service of injury to right wrist, arm, and hand, diarrhea, disease of digestive organs and rectum, and rheumatism, and no medical or other satisfactory evidence showing existence at discharge or for a long time thereafter, and claimant's inability to furnish the necessary evidence to establish the case.

From this action the recognized attorney appealed September 9, 1899, contending that the same is unjust, the evidence showing that the disabilities alleged were contracted in the service and line of duty.

The records of the War Department show that the claimant was enrolled May 4, 1847, and was mustered out October 18, 1848. No evidence of alleged disabilities.

The returns for May, 1848, show captain, second lieutenant, 2 sergeants, and 14 privates absent on an expedition against the Navajo Indians. The claimant is not shown absent at this time.

Charles P. Holden and David A. McCully, comrades, testify in prepared affidavits filed May 5, 1889, that they were informed that the claimant was thrown from a mule while on a scout.

In a subsequent affidavit, also prepared for the occasion, filed April 4, 1899, McCully testified that the claimant also contracted diarrhea while in the service. In reply to a Bureau letter for particulars of the alleged injury of arm, he stated that he did not see the injured arm and can not state the nature of the injury.

Jesse Warren, comrade, also testified in prepared affidavits filed February 21, 1889, and September 14, 1898, that claimant sustained an injury to his arm by being thrown from a mule.

This testimony, filed half a century after discharge, is not of a character that would warrant the presumption that the alleged injury to right arm was received in the service and line of duty, or that the alleged diarrhea, disease of digestive organs and rectum, and rheumatism originated in the service.

This claim comes under the provisions of section 4730, Revised Statutes United States, granting pensions to the soldiers of the Regular or Volunteer Army of the United States who served in the war with Mexico.

The date of commencement of pension in this class of claims is governed by section 4713, Revised Statutes United States, which reads as follows:

In all cases in which the cause of disability or death originated in the service prior to the fourth day of March, eighteen hundred and sixty-one, and an application for pension shall not have been filed within three years from the discharge or death of the person on whose account the claim is made, or within three years of the termination of a pension previously granted on account of the service and death of the same person, the pension shall commence from the date of filing by the party

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prosecuting the claim the last paper requisite to establish the same. But no claim allowed prior to the sixth day of June, eighteen hundred and sixty-six, shall be affected by anything herein contained.

Hence, even if pension were allowed in this case, it could only commence from date of filing the last material evidence necessary to complete the claim.

I am of the opinion, after a careful examination of the evidence in this case, that the Bureau action of rejecting the claim on the grounds stated was proper, and the same is hereby affirmed.

SERVICE—ACT JULY 27, 1892—SABINE INDIAN WAR.

R. G. ENGLISH.

The Sabine Indian war not being one of the wars named in the act of July 27, 1892, the soldiers who served therein are not entitled to pension under said act.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 17, 1900.

R. G. English filed on March 29, 1895, an application for pension under the provisions of the act of July 27, 1892, alleging, as the basis of such application, service in Captain Walker's company of Oldham Grays, Hunt's Regiment Kentucky Volunteers, in the Sabine Indian war. His application was rejected in May, 1895, on the ground that his service was not in one of the wars named in the act of July 27, 1892. He was granted a pension of $8 per month by a special act of Congress approved April 11, 1898. He appealed on October 3, 1898, from the rejection of his claim under the general act of July 27, 1892, his contention being that said act was intended to pension the survivors of all Indian wars between the years 1832 and 1842; that the naming therein of certain wars was not a limitation of its provisions to the survivors of the wars specifically named; that the Seminole war named in said act did not occur between the dates mentioned, and the survivors of that war are therefore not pensionable under the aforesaid act; and that it is clear beyond a reasonable doubt that the word "Seminole" as it occurs in said law was a clerical error and evidently the word "Sabine" was intended.

The Auditor for the War Department reports, under date of May 2, 1895, that the muster roll of Capt. John E. Walker's company of Kentucky Volunteers shows that R. G. English was enrolled as a sergeant August 17, 1836, and discharged September 18, 1836, and that he was paid for one month under section 3, act of March 1, 1837, but received no travel pay.

A report from the Record and Pension Office of the War Department, dated April 10, 1896, states that Captain Walker's company of Kentucky Mounted Gunmen, in service from August 17, 1836, to Septem-

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ber 18, 1836, was called out for the protection of the Sabine frontier (1836) under authority of General Gaines, approved by the War Department.

The act of July 27, 1892, is entitled "An act granting pensions to the survivors of the Indian wars of eighteen hundred and thirty-two to eighteen hundred and forty-two, inclusive, known as the Black Hawk war, Creek war, Cherokee disturbances, and the Seminole war."

The enacting clause reads as follows:

Be it enacted, etc., That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers of the military and naval service of the United States, who served for thirty days in the Black Hawk war, the Creek war, the Cherokee disturbances, or the Florida war with the Seminole Indians, embracing a period from eighteen hundred and thirty-two to eighteen hundred and forty-two, inclusive, and were honorably discharged, and such other officers, soldiers, and sailors as may have been personally named in any resolution of Congress, for any specific service in said Indian wars, although their term of service may have been less than thirty days.

The act confers upon the Department no authority to pension the soldiers of any war except those therein named—the Black Hawk war, the Creek war, the Cherokee disturbances, and the Florida war with the Seminole Indians. The designation of the period within which said wars occurred can not be regarded as giving the act a wider scope, or as manifesting an intent to include all wars which occurred during that period, its evident purpose being rather to denote more clearly the particular wars meant, inasmuch as there had been more than one war with the Creek Indians, and also with the Seminole Indians of Florida.

The appellant says the Seminole war did not occur between 1832 and 1842. There was a Seminole Indian war in 1817–18, but there was also one between the years 1835 and 1842, and it is the latter to which the act of July 27, 1892, refers. The argument that the word "Seminole" was inadvertently used in said act for the word "Sabine" is, therefore, without any foundation.

It can not be assumed that because Congress saw fit to pension the survivors of certain wars which occurred between 1832 and 1842 it intended to pension the survivors of all wars which occurred between those dates. There is no apparent reason why the participants in wars occurring during that period of time should be favored above the participants in wars occurring during any other period. It is reasonable to suppose, therefore, that some other consideration than the time at which the wars occurred determined the action of Congress in pensioning the survivors of the wars named. It is probable that the Sabine disturbance was not regarded as of sufficient magnitude or importance to warrant its inclusion. However that may have been, it was not included either by express words or by necessary implication. The action of the Bureau is affirmed.

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DISABILITY—ACT JUNE 27, 1890—AGE.

J. LOUIS WILL.

The fact that a claimant has attained the age of 65 years does not entitle him to pension, per se, under section 2 of the act of June 27, 1890, regardless of his mental or physical condition, and such was not the view expressed in the case of Francis Frank (9 P. D., 68); but the evidence in this case disclosing the fact that claimant is by trade a pattern maker, and that by reason of age, disease of heart, limitation of motion in knee and shoulder, enlarged veins of leg, and stiffness and limitation and atrophy of hand he is unable to follow said occupation, the action rejecting his claim was error, and is reversed. (Charles Stone, 8 P. D., 477, and William Featherly, 9 P. D., 106.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, December 29, 1900.

J. Louis Will, Company B, One hundred and seventy-first Ohio Volunteer Infantry, filed a claim July 28, 1892, No. 1039255, under the act of June 27, 1890, alleging as disabling causes malarial trouble and piles. The claim was rejected April 20, 1892, on the ground of no ratable disability. He filed another claim January 16, 1897, alleging malarial poisoning, disease of heart, piles, disease of rectum, and disability of left hand and rheumatism as disabling causes. This claim was rejected April 1, 1898, also on the ground of no ratable disability under the act of June 27, 1890, and that claimant was not 65 years of age at date of filing either declaration.

From this action the recognized attorney appealed October 5, 1898, contending that a pension should have been granted to this claimant from the date of his becoming 65 years of age (June 27, 1897).

The certificate of medical examination of August 4, 1897, upon which the last action was based, shows the following condition:

Pulse rate, 88; respiration, 19; temperature, 98.6; height, 5 feet 8 inches; weight, 160 pounds; age, 65 years. His tongue is heavily coated all over and has numerous short, superficial fissures. His state of nutrition is fair. His liver, spleen, and other abdominal viscera are normal. His heart's action is rapid and weak with an occasional irregular intermission with an upheaval. Impulse diminished, no valvular murmurs, area of dullness and location of apex beat normal. His right knee measures 3 inches more than the left, is swollen and very tender; motion limited one-half. The left shoulder is tender, measures 1 inch more than right; motion is limited about one-fourth. He has a few enlarged veins on both legs, not giving any trouble. All other joints and tendons normal at this time (except left hand). His anus and rectum are normal at this time. The first, middle, and ring fingers of left hand can be flexed only to within 1 inch of palm; the thumb, within 1 inch; little finger normal. The flexor tendons are stiff and have adhesions to prevent normal action. The muscles of the hand are soft and atrophied. The grasp of the hand is weak.

George Kress and George Adler, fellow-workmen, testify in affidavits filed January 16, 1897, that the claimant is a pattern maker in safes and locks by trade, and that for the past two years he has not worked, as he is getting old and crippled up with ailments.

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Dr. T. H. Phillips, in an affidavit filed in the Bureau July 28, 1892, testified that claimant came to him September 7, 1878, suffering with inflammation of left hand, which resulted in suppuration of both the back and palm of the hand; that the inflammation was so extensive that adhesions took place, and that the hand is crippled and claimant is unable to close it more than one-half.

The medical referee in his report of October 6, 1900, states:

A careful review of the evidence presented by the claimant and the certificates of examination in the case fails to show the existence of a permanent disability in a degree to materially impair his ability to earn a support by manual labor, and does not warrant the allowance of the minimum rate under the act of June 27, 1890.

There is no authority in law or practice for the allowance of pension for senility from the date a claimant becomes 65 years of age, but if he had attained that age prior to the date of filing his claim the minimum rate could be allowed from the latter date. As no special indications of senility are shown in this case, and as there is no date from which pension could have been commenced after he attained the age of 65 years, there was no warrant for the allowance of a rate for senility.

The last declaration was filed January 16, 1897, and the claimant became 65 years of age June 27, 1897.

The appeal seems to proceed on the theory that the claimant having attained the age of 65 years is entitled to pension, per se, under section 2, act of June 27, 1890, regardless as to what his mental or physical condition may be; and there appears to be a general tendency on part of claimants and attorneys to take it for granted that this theory is conclusive. Such, however, was not the view expressed in the case of Francis Frank (9 P. D., 68), in which the age rule was laid down.

In discussing the question as to the propriety of allowing age to enter as a factor to show inability to earn a support within the meaning of the terms of the act of June 27, 1890, in the Frank case, Assistant Secretary Davis said:

* * * Age alone is a more or less uncertain basis for determining title; some men are senile at 50, while others are comparatively vigorous at a later age.

I therefore hold that unless the evidence and medical examinations disclose an unusual vigor and activity for the performance of manual labor (the base of title under the statute), a claimant for pension under the act of June 27, 1890, who has attained the age of 65 years, should be deemed entitled to at least the minimum rate of pension provided by that act.

In the case under consideration the claimant is 66 years of age. He was found to be suffering, at least in a mild degree, from chronic cystitis, enlarged prostate, rheumatism, defective eyesight (arcus senilis, due alone to effects of age), and lumbago.

The holding therein was evidently based upon the generous, if not gratuitous, supposition that a man having attained the age of 65 years is ordinarily so incapacitated by reason of senility as to interfere with his earning a support to an appreciable extent.

However, in meeting the issue raised by the attorney the question as to the correctness of the principle involved in the Frank case need

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not be discussed, as the claimant was not 65 years of age at the time of filing his application; and as pension under the act of June 27, 1890, must be made to commence from the date of filing the claim, there is no date from which pension could be made to commence on account of age.

The certificate of medical examination shows the right knee swollen and tender, and measuring 3 inches larger than the left, indicating an inflamed condition of the knee, which is limited in motion one-half. The thumb, first, middle, and ring fingers of left hand can be flexed only to within 1 inch of the palm, and the left shoulder is tender, measures 1 inch more than the right and motion is limited one-fourth. There are also some large veins on both legs.

These disabilities would necessarily interfere with and diminish considerably the claimant's ability to earn a support by manual labor within the measuring of the terms of the act of June 27, 1890.

In the case of William Featherly (9 P. D., 106) the Department held that—

> The claimant is by trade a stone mason, the condition of his hand being such as to prevent his working at his trade, and being too old to learn another it is held that he has a pensionable status under the act of June 27, 1890. (Reaffirming departmental decision in the case of Charles Stone, 8 P. D., 477.)

Upon full and careful consideration of the case in hand I am of the opinion that a degree of inability to earn a support by manual labor has been shown to exist from all causes described that entitles the claimant to pension under section 2, act of June 27, 1890.

The action appealed from is therefore reversed and the papers in the case are herewith returned for readjudication of this claim, allowing pension from the date of filing the last declaration January 16, 1897.

MARRIAGE OF COLORED PERSONS—SECTION 4705, REVISED STATUTES—EVIDENCE.

LUCINDA HARRIS (ALLEGED WIDOW).

A claimant who relies upon the rule of evidence provided in section 4705, Revised Statutes, must show, either that she lived with the soldier up to date of enlistment, when the latter died in the service, or, if otherwise, that she lived with him up to the date of death.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

Richard Harris, colored, formerly a slave in the State of Mississippi, enlisted at Natchez in said State, on October 19, 1864, in Company B, Twenty-eighth Illinois Volunteer Infantry, from which organization he was honorably discharged on March 15, 1866. It also appears that while a slave, prior to the war of the rebellion, he was in said State

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joined in marriage to one Lucinda, also a slave, according to slave custom, by a ceremony deemed by them to be obligatory, and that they habitually recognized each other as man and wife, and were so regarded by their neighbors, and lived together as such up to the date of his enlistment. It also appears that the said soldier has never been seen or heard from since the date of his discharge, and no intelligence of of his existence has been received.

On July 19, 1890, Lucinda Harris, applied for pension under the provisions of the act of June 27, 1890, which claim was rejected on November 29, 1898, on the ground that slave marriages are not regarded as having established a valid relation by the Bureau of Pensions, and upon the further ground that the soldier did not return to the claimant subsequent to his discharge.

From this action appeal was taken on December 28, 1898, based upon the provisions of section 4705, Revised Statutes, and the act of March 13, 1896.

There are two essential conditions mentioned in said section relating to the validity of a slave marriage as it is therein recognized for pensionable purposes, which are set forth in the following language: "And lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to date of death." It will be observed that neither of those conditions is present in the case at bar. The soldier did not die in the service, nor did he and the claimant live together as man and wife from the termination of his military service up "to date of death." Congress seems to have intended that proof of a marriage ceremony alone should not be sufficient to create the pensionable status contemplated in said section, but that one of the above-enumerated conditions should constitute an essential element in the marital relations therein described. Neither of these conditions being present in the case now pending, the claim was properly rejected on that ground.

The claimant invokes the benefit of the rule of evidence provided in the act of March 13, 1896, pointing out the fact disclosed by the evidence that no intelligence of the soldier's existence has been received since the termination of his military service in 1866. This evidence, it is contended, under the provisions of the act above mentioned, constitutes sufficient proof of death. Under the peculiar facts in this case said act of March 13, 1896, can not avail the claimant, for the reason that positive proof of the death of the soldier subsequent to his military service would not establish the claim. The claimant did not live with soldier from the time of his discharge to the date of his death, hence one essential element in her pensionable status is wanting.

The action of rejection seems to have been proper and the same is hereby affirmed.

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SERVICE—COMMISSIONER OF BOARD OF ENROLLMENT.

LUCIUS DE WITT MORSE.

This appellant's service was rendered as a commissioner of the board of enrollment of the Second Congressional district of the State of Missouri. He filed an application for pension under the provisions of the general pension law on account of disease alleged to have been contracted during said service; and also an application for pension under the provisions of the second section of the act of June 27, 1890, on account of said service.

Held, That there is no provision of law granting pension for disease contracted while serving as commissioner of board of enrollment, and that such service is not a pensionable service under the provisions of the second section of the act of June 27, 1890.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

Lucius De Witt Morse, late a commissioner of the board of enrollment for the Second Congressional district of the State of Missouri, filed in the Pension Bureau on September 8, 1887, an application for pension under the provisions of the general pension law, based on dysentery and resulting chronic diarrhea, disease of intestines, and general debility, alleged to have been contracted in line of duty during his service as such commissioner of the board of enrollment, which was rejected on February 7, 1889, upon the ground that there was no provision of law providing a pension for disease contracted during service as such enrolling officer.

On August 26, 1890, he filed an application for pension under the provisions of the second section of the act of June 27, 1890, alleging a service of ninety days and more during the war of the rebellion as commissioner of board of enrollment, as aforesaid, an honorable discharge from said service, and inability to earn a support by manual labor from chronic diarrhea, debility, and disease of urinary organs, which was also rejected on June 6, 1891, upon the ground that his service as such commissioner of board of enrollment was not a pensionable service under the provisions of said section.

From the rejection of both of said applications for pension, as aforesaid, the present appeal was taken on October 13, 1898.

The only service originally alleged by the appellant to have been rendered by him, and shown by the record evidence filed in the case, was as a commissioner of the board of enrollment for the Second Congressional district of the State of Missouri, from June 2, 1863, to May 5, 1865.

The only provision of law providing a pension for enrolling officers, such as the appellant, is contained in the fifth subdivision of section 4693, Revised Statutes, which provides that any provost-marshal, deputy provost-marshal, or enrolling officer disabled by reason of any

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wound or injury received in the discharge of his duty may be pensioned therefor.

No provision whatever is made by any law for granting a pension to such officers on account of disability resulting from disease contracted during such service, and it has uniformly been held that disability resulting from disease contracted under such circumstances was not pensionable under the pension laws.

It has repeatedly been held by this Department that service as a provost-marshal, deputy provost-marshal, or enrolling officer during the war of the rebellion is not such military service as is contemplated by the provisions of the second section of the act of June 27, 1890; such persons, having been employed and having served in the civil branch of the service, are not included within the terms of said section and are not pensionable thereunder. See decisions in the cases of Andrew J. Shannon (7 P. D., 64), and James M. Barnes (8 P. D., 94), and the decisions therein cited, wherein this subject is so fully and exhaustively discussed and considered as to require no further elucidation or comment at this time.

In the present appeal, this appellant, for the first time, asserts that he also served for a time during the war of the rebellion as surgeon of the First Regiment of Enrolled Missouri Militia, and files with the appeal a commission from the provisional governor of the State of Missouri, dated June 3, 1863, appointing him surgeon of said regiment. There is no sufficient evidence on file in this case showing that the appellant ever served in the Enrolled Missouri Militia, as alleged, but even if there was it would not benefit him or improve his pensionable status under the law in the least, since the First Regiment of the Enrolled Missouri Militia was a military organization in the exclusive service of the State of Missouri, and was never at any time in the military service of the United States, and service therein, or disability incurred in such service, would confer no pensionable status or title to pension whatever upon the appellant under the provisions of any existing law.

In view of the foregoing the rejection of the appellant's applications for pension upon the grounds respectively stated was clearly without error, and said action is affirmed accordingly.

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DISABILITY—PATHOLOGICAL SEQUENCE—MYOPIA.

ADOLPH BECKER.

The certificate of medical examination, made under appellant's claim for increase, shows that his loss of vision in both eyes is due to intraocular changes caused by a high degree of myopia, which can not be accepted as due to his military service. Action affirmed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

This appellant, Adolph Becker, late captain Company G, Twentieth New York Volunteer Infantry, is pensioned by certificate No. 447326 at $20 (total of rank) a month, under the general law for partial loss of vision.

His application for increase, filed June 17, 1899, in which he alleged entire loss of vision, was rejected on April 18, 1900, for the reason that the present condition of his eyes, including total blindness, is due to excessive myopia not attributable to the service.

The attorney in the claim filed an appeal from this action on April 25, 1900, and alleged that the action of the Bureau was erroneous, because while in the service he had incurred disease of his eyes, which had caused the partial loss of vision for which he is pensioned, and that disease had progressed until total blindness had ensued..

The appellant applied for a pension on March 8, 1889, and alleged that while he was captain of Company G, Twentieth New York Volunteer Infantry, he became disabled by partial loss of sight of both eyes, about June 30, 1862. The records of the War Department show that he was mustered in as captain of said company on July 6, 1861, and was mustered out with his company on June 1, 1863, and that he was not reported as sick during that term of service. He entered the service again on May 4, 1864, as captain of Company D, Forty-sixth New York Volunteer Infantry, was promoted to the lieutenant-colonelcy of said regiment on December 5, 1864, and was mustered out on July 28, 1865. During this last term of service he is not reported as sick, except that when he had overstayed his leave of absence in January, 1865, he furnished the certificate of a civil surgeon, in which it was stated that he was unable to return to his command because of "oorumation(?) of his breast."

The claim was originally allowed on the testimony of Hermann Bennecke, late captain of Company F, Twentieth New York Volunteer Infantry, and Rudolph Bentler, late first lieutenant, Company G, of same regiment, who testified that appellant's vision was good when he entered the service in 1861, and that about June or July, 1862, he began to complain of pain in his eyes and impairment of vision. The affidavit of George W. Travers, lieutenant-colonel of the Forty-sixth

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New York Volunteer Infantry, was also furnished, who testified that he saw the appellant during his first service in the Twentieth New York Volunteer Infantry, who told him in the winter of 1862–63 that his vision was impaired on account of the hardships he had undergone during the seven days' fight in June and July, 1862. The evidence of the surgeon of the Forty-sixth New York Volunteer Infantry was also filed, who stated that the appellant complained of impaired vision during his service in that regiment.

The first medical evidence of treatment after discharge was filed in March, 1891, in which the physician stated that he had been appellant's neighbor and family physician for the past ten years, during which time he had treated him for disease of the heart of a grave character, but did not mention disease of eyes.

The next medical evidence filed was that of Dr. Charles J. Kipp, who stated that the appellant had consulted him on April 4, 1887, and that he had found on examination that the left eye was practically blind from sclero choroiditis posterior; that the refraction of the eye was highly myopic, and vision so much reduced that he could count fingers only at 10 feet; that the right eye was also myopic (M. 4, 5, D.) and its sight somewhat impaired; that he was unable to use his eyes for any length of time without causing pain, and was therefore unable to pursue his profession of a teacher for many hours consecutively.

When the officer was first examined, on July 3, 1889, the board reported that there was dense sclerosity of the choroid in left and in lesser degree in the right eye; that vision was nil per Snellen's test types unaided by glasses; with glasses vision in right eye was 20 40, nil in left eye. With the left eye he could distinguish light, but no objects; with right eye objects could be seen, but not clearly defined.

The rate of pension was determined from this certificate, and a pension of $20 per month (total of rank) was allowed, with the statement that refractive defect was excluded in rating.

A claim for increase filed March 22, 1890, was rejected on May 14, 1891, with the statement that impaired vision was principally due to refractive error. The pensioner was examined under this claim by an oculist, who reported that there was total blindness of the right eye, caused by complete detachment of the retina; but the external structures of the eye were in a normal condition and the lens was transparent. In the left eye there were no abnormalities in the external structures or in the lens, but there were large floating opacities in the vitreous; the optic disk was grayish and the choroid adjoining it on the nasal side was atrophic for a space the size of the disk, and there were also atrophic changes on the temporal periphery of the choroid, but the retina was transparent. This eye was myopic (M. 7 D), and vision with — 7 D glass was 15/100.

On June 17, 1899, the pensioner filed another application for increase,

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and alleged that total blindness had ensued. This claim was rejected on April 18, 1900, with the remark that the present condition of eyes, including total blindness, was due to excessive myopia, not attributable to service. This action was taken after another examination by a specialist, who reported that the external parts of both eyes are normal; in the right eye the cornea and aqueous are clear, the anterior chamber is deep, the pupil is larger than normal and does not react, the iris is tremulous; with oblique illumination the lens is of a dark color, and with the opthalmoscope nothing can be seen; it is all dark.

In the left eye the cornea and aqueous are clear, the anterior chamber is deep, the pupil is quite large and does not react; it is larger than the left one; the iris is very large and tremulous; the lens is slightly opaque; there is a large detachment of the retina; at the situation of the optic disk some very small blood vessels can be seen, but the disk is not distinguishable; the tension of both eyes is below the normal, and both are totally blind.

Diagnosis: Detachment of the retina and dislocation of the lens of both eyes and cataract of the left.

The pensioner filed an appeal from this action of rejection on April 25, 1900, and alleged that it was erroneous, because he had contracted a disease of the eyes in the service which had produced the partial loss of vision for which he is pensioned, which had progressed until total loss of vision had ensued.

As there was doubt relative to the nature of the cause of the impaired vision for which the appellant is pensioned, the case was returned to the Bureau for a statement setting forth the nature of the disease of the eyes for which the original rate was allowed and the character of the ocular disease which was ascribed to the refractive error, and also to state what caused the intraocular changes described in the certificates of examination, which have caused the loss of vision, and to give the reasons for refusing to admit them as due to appellant's military service.

Under date of July 16, 1900, the medical referee, in a communication addressed to the chief of the board of review, made the following reply to these inquiries:

When the original action was taken in this case, in 1889, the testimony showed that claimant's vision was materially impaired, but the cause of same was not stated. The certificate of examination, then in the case, showed some changes in the choroid coat of the eyes, reported as "sclerosity" (?). It also showed refractive error, but failed to state the nature of same. The next examination, also made by a board of surgeons, was equally indefinite, said board ascribing the impaired vision to changes in the lens of the right eye and opacity of the cornea of the left. A test examination by an eye expert was next ordered, and the certificate of said examination, made April, 7, 1891, showed for the first time since filing the claim the actual condition of the eyes. A completely detached retina of the right eye was shown to account for the loss of sight of this eye, and there were atrophic changes near the optic disk and

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at the temporal periphery of the choroid, with seven dioptrics of myopia, to account for the defective vision of the left eye. The last examination, dated December 7, 1899, also made by an oculist, corroborates the findings of the first expert. It also shows that the retina of the left eye has become detached and that the lens of each eye is dislocated.

It appears, therefore, that the only abnormal conditions of the eye shown in this case since filing the claim are atrophic changes in the choroid, detachment of the retina, and dislocation of the lens of each eye, with cloudiness of the lens of the left eye, all of which conditions, and in the order named, are not uncommon results of a high degree of myopia, such as shown in this case. It is conceded, however, that there may have been some disease of the eyes due to claimant's military service which has become obscured or obliterated by the destructive changes due to myopia.

It is probable that the rate originally allowed in this case was for the changes in the choroid reported by the first examination, and which were not recognized as characteristic of myopia until the report of the expert who examined pensioner in 1891 was filed in the case. This pensioner has been given the benefit of all doubts, and allowed to draw the rate originally granted, although no abnormal condition of the eyes has been shown since filing the claim, except that due to myopia, which can not be accepted, from a medical standpoint, as originating from claimant's military service.

The blindness is due to detached retina of each eye, which is a result of the high degree of myopia.

It may be proper to add that myopia is usually due to an elongation of the visual axis of the eye, accompanied by stretching of the coats of the eyeball. The tendency to such elongation is congenital and very often inherited. It manifests itself or develops during adolescence, shows a tendency to increase in degree from time to time as a result of eye strain, and high degrees of myopia are frequently accompanied by such intra ocular changes as are shown to exist in this case.

It does not appear, therefore, that any injustice has been done this pensioner. The action appealed from is adhered to.

As it is stated in this opinion that the blindness is due to detached retina of each eye, which is a result of the high degree of myopia, which can not, from a medical standpoint, be accepted as originating from claimant's military service, and as some of the original witnesses had testified that appellant's vision was good when he entered the service, the action of the Bureau was reversed on July 28, 1900, and the case was remanded for a special examination to ascertain the condition of his eyes when he entered the service.

The special examiner was unable to find any one who was acquainted with the appellant before he entered the service, owing to the fact that he had been in this country but a short time before the war began, and, therefore, took the testimony of those only who became acquainted with him soon after he entered the Twentieth New York Volunteer Infantry, which was his first service.

Rudolph Bentler, who was second and first lieutenant in Company G, of the Twentieth New York Volunteer Infantry, of which the appellant was captain, testified before the special examiner that he remembered that appellant was nearsighted before the seven-days' fight, and that this condition existed in 1861.

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Max Weber, who was colonel of said regiment in 1861, and held that position until May, 1862, when he was appointed brigadier-general, testified before the special examiner that he knew the appellant in 1861, before he was appointed captain, and that he remembered that his eyes were defective and that he wore glasses.

Henry E. Roehr, who was first sergeant of Company I, of the Twentieth New York Volunteer Infantry, and was afterwards appointed second lieutenant of Company G, of which appellant was captain, testified that he remembered that he used glasses from his earliest recollection of him before he (the affiant) joined his company, and that he had no recollection that he complained of any pain or disease of eyes while in service.

The appellant denies that he wore glasses in the service or that he was shortsighted until many years after the war had closed.

It has been shown by the testimony of Dr. Kipp, who is appellant's own witness, that he had a high degree of myopia in 1887, when he first treated him, which statement has been confirmed by all the specialists who have examined him since.

After considering the evidence obtained by the special examiner the Bureau declined to recede from its former action of rejection and referred the case to this Department, accompanied by another opinion of the medical referee dated October 6, 1900, who, after quoting the evidence obtained on special examination, states:

But his duties were not such as to require close application of the eyes during the service; he had no constitutional disease which would account for any ocular trouble; he describes no symptoms of acute inflammation of the eyes, and the cause which he assigns would not involve any special eye strain. It assuredly was not adequate to cause myopia, which, independent of those cases resulting from acute inflammatory lesions, is of insidious onset and slow growth.

* * * * * * *

It thus appears that the testimony obtained by the special examiner is, on the whole, adverse. Only one officer testifies to incurrence at the time alleged, and one to a defect at a later date; two testify to the defect at an earlier date, one of them at enlistment, while another has no knowledge of any defect at any time. None of them show any acute inflammatory trouble or external evidence of disease, except General Weber, who states that his eyes "looked reddish" at the time he joined the regiment.

The appellant may have had but a mild degree of myopia prior to his enlistment—perhaps not sufficient to make the use of glasses essential for ordinary work—but the nature of the disability and the evidence elicited warrant the conclusion that it had its origin prior to his entry into the Army and slowly increased until eventually total blindness resulted. The absence of any evidence of general impairment of health in the service, of any acute inflammation of the eyes, and of any other cause sufficient to induce ametropia in eyes that were previously emmetropic, coupled with a knowledge that such lesions as the appellant's eyes present are, in a very large percentage of cases, due either to inherited or congenital defects, or arise during the period of adolescence as a result of eye strain, are deemed sufficient grounds for adhering to the adverse action in the claim for increase.

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This conclusion of the medical referee is in accordance with the opinions of the best authorities on opthalmology. The eye strain that aggravates myopia is such as requires the work to be brought close to the eyes and causes convergence of their axes; in fact, such work as the appellant pursued for many years after he left the service, when he was a bookkeeper, clerk, and teacher.

Dr. Edward Jackson of Philadelphia states that—

> It is universally recognized that prolonged near work favors the incurrence and increase of myopia. Such near work causes physiological hyperemia, often exaggerated by poor light or excessive minuteness of the objects looked at; faulty position of the head, leading to venous congestion of the eyes; confinement indoors to a sedentary occupation, which impairs nutrition; strain of accommodation; and excessive convergence which sooner or later increasing myopia renders necessary. When the eye becomes myopic its elongation makes convergence abnormally difficult, and the continued use of the eye for near work, because it can not be used for distinct distant vision, increases the amount of convergence required of it.

See An American Text-book of Diseases of the Eyes, Ear, Nose, and Throat, W. B. Saunders, Philadelphia, 1899, page 220.

This increased pressure of the ocular muscles caused by the constant attempt to sustain the convergence necessary for distinct vision increases the axial myopia already existing it may be only in slight degree, so that the eyeballs become still more elongated and finally the sclera yields at its weakest place, which is in the vicinity of the entrance of the optic nerve and posterior staphyloma results and by the stretching of the coats of the eye the retina becomes detached from the choroid and the vision is destroyed. The reports of the specialists show that this has been the cause of the disease in this case, as there is a high degree of myopia (7 diopters) and detachment of the retina in both eyes.

After a careful consideration of all of the facts in this case it is believed that the action of the Bureau in denying appellant's right to increase of his rate of pension was correct and in accordance with the law and the evidence. It appears that he was given the benefit of all the doubts in his case when it was first allowed and that the progress of his disease would seem to indicate that there is room for serious doubt as to whether he really contracted any disease of the eyes during his military service.

The action of the Bureau is affirmed.

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LINE OF DUTY—EVIDENCE—INCREASE—ACCIDENTAL WOUND.

PINCKNEY HOPPER.

The certificate of medical examination made under the claim for increase does not show that the disabilities from pensioned causes have increased. The evidence on file in the case shows that the newly alleged disability—gunshot wound of right ankle—was not incurred in line of duty, having been caused by the accidental discharge of a pistol carried by claimant at his own risk.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

This appellant, Pinckney Hopper, late of Company I, One hundred and nineteenth Illinois Volunteer Infantry, is pensioned by certificate No. 270707, at $14 per month, for right inguinal hernia and rheumatism. He applied for a pension for hernia on October 30, 1879, and on February 19, 1887, he filed a claim on account of disability due to an accidental gunshot wound of the right ankle. On February 9, 1891, he filed a declaration for additional pension on account of rheumatism. The claim for hernia was allowed in 1884, to date from discharge; the claim for gunshot wound of right ankle was rejected on July 18, 1890, for the reason that it was not incurred in the line of duty, and the claim for rheumatism was allowed on April 12, 1894, at which time he was allowed a rate of $4 per month for that disability, while the rate for the hernia was increased to $10 per month from December 4, 1891, under the provisions of ruling No. 245.

On March 3, 1897, he applied for increase of pension and stated that he was also disabled by impaired vision and by a partial rupture on the left side as a result of the hernia on the opposite side. It does not appear from this application that he definitely claimed any increase from rheumatism.

This claim for increase was rejected on December 18, 1898, on the ground that there was no increase of disability from the right inguinal hernia (complete) and the rheumatism for which he was pensioned. The board of surgeons failed to find any disease of eye or a hernia on the left side, and they were rejected for the reason that no disability had been shown from those causes.

On September 15, 1899, the attorney in the claim filed an appeal from the rejection of the claim for increase of pension for accepted disabilities, and on June 11, 1900, he filed an appeal from the rejection of the claim for the accidental gunshot wound of the right ankle.

The certificate of medical examination which was made on June 7, 1897, showed that the pensioner was 5 feet 10½ inches in height, weighed 165 pounds, and was 58 years of age, with normal pulse rate, temperature, and respiration. The board stated that there was an incomplete inguinal hernia on the right side which passed through the

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internal ring only, and could be easily reduced and was retained by a truss. The board also stated that the joints on the left side of the body were enlarged and tender with general thickening of surrounding membranes and ligaments, and that the motion and power of joints were impaired one-third, and the heart was normal.

This description of appellant's condition shows that the disability from the hernia has decreased, for he is pensioned for a complete hernia, the rate of which is $10 per month, while the certificate shows that the hernia is now incomplete, the rate for which disability is fixed at $6 per month by the schedule. A comparison of the description of the effects of rheumatism with that given in the next prior certificate shows practically the same condition. The board states that there was a swelling of the joints of the left side of the body, but gives no comparative measurement to show its degree; moreover, a swelling of all the joints of one side of the body from rheumatism could not exist without a very considerable increase of the temperature of the body, which is reported to be normal (98.5°).

In view of these considerations it is believed that if there is any increase of disability from the rheumatism it is fully covered by the excess of rate which the appellant is receiving for the hernia.

The action of the Bureau in rejecting the claim for increase is therefore affirmed.

In regard to the wound of the right leg, the records of the War Department show that he was wounded by the accidental discharge of a revolver in Missouri in October, 1864, and that he was treated in a general hospital in Quincy, Ill., for an accidental gunshot wound of the lower third of the right leg, apparently, until he was mustered out on June 22, 1865.

It appears from appellant's statement and from those of his comrades that while he was engaged in cleaning a revolver, which was his own private property, it was accidently discharged, and that the ball entered the right leg near the ankle. It is not shown by any of the testimony filed how the revolver was accidently discharged, nor that it was not due to appellant's carelessness in handling it.

It is not claimed that the revolver was issued to appellant by any officer of the Army, nor is it alleged that he was carrying it in compliance with the order of any of his officers.

The question involved in this case has been repeatedly considered by this Department, and it has been decided many times that a wound incurred under the circumstances detailed was not received in the line of duty.

In the case of Alexander H. Davis (1 P. D., O. S., 486), Secretary Delano held that—

The soldier—an infantry man—having been injured, as alleged, by the accidental discharge of a pistol in his pocket, is not pensionable on account of such injury, the

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Adjutant-General holding that infantry soldiers are not armed with pistols, and such injuries are not entitled to consideration.

In the case of Daniel Compton (4 P. D., O. S., 144), Secretary Schurz held that—

Infantry soldier is not in line of duty when wounded by the accidental discharge of his own pistol, as the pistol is not a part of the arms of an infantryman.

In the case of Robert M. Dick (3 P. D., 333), Assistant Secretary Bussey held that—

It is presumed that the Government supplies its troops with all weapons needed for offense and defense against the enemy, and if they choose to carry other weapons they do so without authority, very often in contravention of authority, and always at their own risk, and injuries thereby are outside of the line of duty, and not pensionable.

The same principle was enunciated in the cases of Arthur Boyd (1 P. D., 105); William H. Pike (1 P. D., 253); Alfred P. Remick (3 P. D., 131); Samuel Emmett (3 P. D., 281), and Elias W. Reidy (7 P. D., 132).

It appears, therefore, that the action of the Bureau in rejecting appellant's claim for the accidental gunshot wound of right leg on the ground that it had not been incurred in the line of duty was correct, and it is accordingly affirmed.

DESERTION—VOIDABLE ENLISTMENT—MINORS.

STEPHEN F. MONTHONY.

In 1861 the enlistment of a minor under the age of 18 years was voidable, and a repudiation of such enlistment on the part of the minor by the act of desertion would constitute no bar to pension on account of a disability incurred during the period of a second enlistment.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

Stephen F. Monthony enlisted in Company K, Second New York Veteran Volunteer Cavalry, on October 18, 1863, from which organization he was discharged on November 8, 1865. From the date of his discharge he was pensioned under the provisions of the general law by reason of a disability resulting from a gunshot wound of the left shoulder incurred on April 23, 1864. (Certificate No. 103153.)

On January 6, 1898, he was notified that a report from the records of the War Department disclosed the fact that he had enlisted on November 24, 1861, in Company I, Ninety-third New York Infantry, from which organization he had deserted on September 1, 1863, which charge of desertion had not been removed. In accordance with the provisions of the act of December 21, 1893, he was given thirty days in which to file evidence and show cause why he should not be dropped from the rolls. On February 19, 1898, no evidence in rebuttal of the

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said records having been filed, his name was dropped from the rolls on the ground of desertion from a prior enlistment.

On February 3, 1899, the soldier filed an application for restoration to the pension roll, based upon the allegation that he was only 16 years of age at the time of his first enlistment, and that there was no law then in existence which authorized the enlistment of a person under the age of 18 years with or without the consent of his parents or guardian, by virtue of which his said first enlistment was null and void under the law. The application for restoration rested upon the principle announced in the case of Jasper M. Stine (9 P. D., 488).

The claim was denied on November 7, 1899, on the ground that the claimant was not shown to be under the age of 16 years at the time of his first enlistment, and for that reason the principle announced in the above-mentioned case did not apply. Subsequent to this action the claimant, as a basis for reopening his claim for restoration, on March 20, 1900, filed the affidavit of his mother, Margaret Monthony, who testified that he was born on April 9, 1846, which, if true, would show that he was under the age of 16 years at the time of said first enlistment. This evidence upon consideration was held, on May 28, 1900, to be insufficient to authorize any change of action.

The case is now before the Department on appeal taken on October 5, 1900, resting upon the contention that the claimant's statement at the time of his enlistment, to the effect that he was then 16 years of age, is overcome by the testimony of his mother.

The contention in the appeal, in so far as it involves an inquiry as to whether the claimant was 16 years of age at the time of his first enlistment in 1861, is immaterial for the reason that 18 years was the minimum age for enlistment prior to July 4, 1864, at which time it was determined by Congressional enactments that no minor under the age of 16 years shall be enlisted or mustered into the military service with or without the consent of his parent or guardian. This law is now embodied in section 1116, Revised Statutes.

Section 11 of the act of March 16, 1802, entitled "An act fixing the military peace establishment of the United States" (2 Stat. L., 132), fixes the minimum and maximum ages for enlistment at 18 and 35 years, respectively.

Winthrop on Military Law, page 766, enumerates the various acts of Congress, including that of April 30, 1790, and the act of July 4, 1864, concerning which he says that—

> In all these statutes except the last the minimum age for enlistment is fixed at 18 years; in the last, enlistments (with consent) of persons as young as 16 are legalized. The latter age was also established as the minimum early in the war of the Revolution, by resolution of Congress of January 17, 1776.

The above-mentioned authority also says:

> The commissioners for the revision of the statutes decided that the provision of the act of 1802 fixing the maximum at 35 years was still unrepealed; and upon

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this provision and that of the act of July 4, 1864, as establishing a minimum, they stated it as the existing law that recruits, at enlisting, must be between the ages of 16 and 35 years; and it was so enacted in section 1116 of the Revised Statutes.

In the Stine case it was material to inquire only whether he was under the age of 18 years at the time of his first enlistment in 1861.

The authorities therein cited, in which it was held that an enlistment of a minor under the age of 16 years is voidable at the election of the minor himself had reference to acts of desertion subsequent to July 4, 1864. In 1861, when the claimant in the case at bar, as well as Stine, deserted, both of them being under the age of 18 years, their status in respect to the minimum age of enlistment was the same as that of a minor under the age of 16 years after July 4, 1864. Prior to the passage of the last-mentioned act, therefore, the principle announced in the Stine case was applicable to the case at bar.

The claimant, it appears, was pensioned on account of a wound received in April, 1864, during the period of his second enlistment.

In the case of John Norton (9 P. D., 382) it is held that—

If the disability was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected, on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

In the case of Jasper M. Stine it is held as follows:

The appellant having made a void or at most a voidable contract of enlistment in 1861 to serve three years, and having by desertion shown his intention to repudiate it, was no longer bound to serve by virtue of that contract. Hence his reenlistment in 1863 was not in violation of his former contract, and he was not, during his service under such reenlistment, absent from his proper command and out of the line of duty.

This case is controlled by the last-mentioned ruling, in view of which the action in denying the claim for restoration was erroneous, and is hereby reversed, with directions that the same be readjudicated in accordance with this opinion.

ESTOPPEL—MARRIAGE—EVIDENCE.

CLARA M. BENNETT, ALLEGED WIDOW OF WILLIAM M. COVERT.

Claimant herein swore, in 1864, that soldier was married to one Sarah Hutchinson, and that she was present at the ceremony. By reason of such statements, the Government granted pension to said Sarah and paid it to her during her lifetime, and thereafter to her children during their pensionable minority.

Held, Claimant is estopped from now setting up the fact that she, and not Sarah, was the wife.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 5, 1901.

Clara M. Bennett, an alleged former widow of William M. Covert, late a private in Company I, Eleventh Indiana Volunteer Cavalry, filed

her application under the general law on September 26, 1898, claim being rejected on September 22, 1900, on the ground that claimant was never the widow of the soldier in question. An appeal filed on October 19, 1900, alleged error in law and fact.

Before discussing this particular claim it will be necessary to note certain facts which are divulged by the papers herein.

It appears that on February 1, 1867, due proof of the marriage of the above-named soldier with one Sarah Hutchinson having been made, a certificate was issued to said Sarah as the widow of said soldier in behalf of herself and two children. Pension under this certificate was paid until the death of Sarah, and was then paid, under another certificate, to the guardian of the said children until they arrived at pensionable majority.

Among the papers in the claim of said Sarah are found two noteworthy affidavits. One of said affidavits, signed by said Sarah, recites the facts and date of her marriage with the soldier and the birth of her two children. This document also contains the sworn corroboration of witnesses as to the truth of such statements and the personal knowledge of said witnesses that said statements were true. The claimant herein, Clara, is one of these subscribing witnesses. The second affidavit of importance is subscribed and sworn to by the said Clara, and contains the following, viz:

> That she has been for twenty years well acquainted with Sarah Covert, his widow; that she was present and saw said parties married at Avon, Livingston County, N. Y., and that she believes there is no record, either public or private, of their marriage, and that the clergyman who married them is dead; that they were married on the 25th day of June, 1853, by Rev. ——— Campbell.

The foregoing is all that is necessary to be referred to in the original claim.

The claimant herein, in the affidavits in the claim which she has been prosecuting, swears that she, claimant, was married to the soldier "in the spring on the —— day of 1854, A. D., by Rev. ——— ———, a Presbyterian minister at East Avon, Livingston County, N. Y."

A special examination was held, and claimant admitted her signature as genuine on one of the affidavits referred to in the claim of Sarah, but denied her signature on the other one. It may be remarked, in passing, that if one of these signatures is genuine, the other is, or else it is a remarkable piece of forgery. Claimant, during her examination, admitted that the community supposed, and she allowed people to suppose and believe Sarah, who was claimant's sister, to be the wife of the soldier, but that, in fact, she was not; she, claimant, being the real and lawful wife.

The attorney who prosecuted the claim of Sarah was found, and he swore that these two sisters, Sarah and Clara, were living together in the same town, Lafayette, Ind., when he filed the claim for Sarah in 1864. That the said Clara signed both the affidavits mentioned herein,

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and that she, Clara, was the "moving spirit" in working up the claim. That she never pretended in any manner that she had any conjugal rights under the soldier, and that she uniformly held out her sister Sarah to be the widow of the soldier.

It is not necessary to discuss the further evidence in this case, which partakes of the marvelous and improbable, but to call attention to the law upon such a condition of affairs.

This claimant in 1864 twice swore to the fact that Sarah was the widow of the soldier, and was his lawful wife during his lifetime. She further swore that she was present and saw the soldier and Sarah married.

This is clearly a case where the doctrine of estoppel in pais applies. Mr. Greenleaf, in discussing this doctrine in 1 Greenl. on Evi., sec. 207, says:

> Admissions, whether of law or fact, which have been acted on by others, are conclusive against the party making them, in all cases, between him and the person whose conduct he has influenced.

And in section 208, the same author says:

> It makes no difference in the operation of this rule whether the thing admitted was true or false; it being the fact that it has been acted on that renders it conclusive.

In the present case this claimant not only admitted the marriage of Sarah and the soldier, but she swore to it as an actual fact, stating that she was an eyewitness to the ceremony. If her simple admission would estop her, a fortiori her unqualified sworn statement that she was an eyewitness to the ceremony.

It matters not now as to whether claimant committed perjury in 1864. She then swore to certain facts which caused the Government to acknowledge Sarah as the wife of soldier, and Sarah's children as his children. She will be held to the legal effects of her statements, and is therefore now estopped from setting up the fact that she, and not Sarah, was the wife.

EVIDENCE—PRESUMPTION OF DEATH—ACT MARCH 13, 1896.

MARY E. BURKE (ALLEGED WIDOW).

The soldier abandoned his family in 1882 in the city of Philadelphia, Pa., without any warning or previous intimation of his purpose, and remained in said city for two years thereafter without communicating with his wife, his mother, or other relatives. *Held*, That his absence from his home and family is not unexplained, and that there is no reason for presuming his death.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 18, 1901.

On June 30, 1898, Mary E. Burke, as the widow of John M. Burke, formerly of Company A, Nineteenth Pennsylvania Cavalry, filed a

declaration for pension under the provisions of the act of June 27, 1890. The declaration alleges that the soldier disappeared from their home in the city of Philadelphia about sixteen years before the claim was instituted, and that about two years thereafter she heard that he was still in the city; that for the last fourteen years nothing has been heard from him, nor has any intelligence of his existence been received.

Her claim was adjudicated on January 11, 1899, and rejected on the ground that the evidence on file is insufficient to establish the death of the soldier or to authorize the presumption of death in legal contemplation.

Assigning said action as error, appeal was taken on February 21, 1899, resting upon the contention therein set forth, as follows:

The claimant appeals for a reconsideration of her claim under the act of March 13, 1896, that she has complied with all the conditions of said act of Congress and she has established a prima facie case beyond a doubt; she has not only sworn that her husband has been absent since October 20, 1882, but his present whereabouts are unknown to her or to any of her or his relatives and friends; that her husband's mother is still living and resides with the claimant; furthermore, he has two brothers and a sister living, and they have no knowledge of his whereabouts; none of them have ever heard from him since he left the claimant in October, 1882; that he has been suffering from affection or an injury to his head, and it is the belief among all his friends that he has either become mentally deranged and died unknown or that he has died years ago from the injury to his head. There is no person who is under the impression that he is still alive.

The claimant has furnished the affidavits of four reputable witnesses, and among the four was the testimony of her husband's mother.

She therefore respectfully asks that the Secretary of the Interior Department will call for all the papers in her claim and will give the same careful consideration, because she candidly believes that she has established a prima facie case under the act of March 13, 1896, and that she is justly and lawfully entitled to a widow's pension under the act aforesaid and upon the evidence that she has already filed in the claim.

The evidence in the case is to the effect that the soldier, without any warning or previous intimation of his purpose, left his home on or about October 20, 1882, and that about two years thereafter the claimant heard that he was still in the city of Philadelphia. Since that time it appears that neither the claimant nor his mother nor sister have received any intelligence of his existence. The claimant testifies—and in that respect she is corroborated by other witnesses—that the soldier was a confirmed drunkard and was cruel in his treatment toward her; that he was idle and shiftless and did not make anything like ample provision for the needs of his family, and that he spent much of his time in the society of disreputable women. Claimant says that she heard a rumor to the effect that he ran away with a worthless woman. The mother of the soldier testifies that when he was a small boy he was kicked on the head by a horse and that his

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skull was fractured by the blow. The witness also states that the soldier incurred a sunstroke during the period of his military service, and was afterwards liable to be irritated by a merely trivial matter. The claimant and two of her witnesses express the belief that the soldier, by reason of the injury to his head and his vicious and immoral habits, was demented or partially insane. This belief, they say, is based upon the fact that his actions were queer and that his conversation was at times irrational.

Some of the witnesses, including the mother of the soldier, say that he was very fond of her and of his children, and that his failure to return and visit them can not be reasonably accounted for in any other way than by the supposition that he is dead. This contention, however, loses much of its force in the light of the fact disclosed by the evidence that he remained in the city of Philadelphia at least two years after the abandonment of his family, during which time he paid no attention to his mother or his children.

The claimant invokes the benefit of the rule of evidence contained in the act of March 13, 1896, wherein it is provided that the "continued and unexplained absence" of an "enlisted man or officer" for a period of seven years may, under conditions therein mentioned, constitute sufficient proof of death. The evidence, however, very clearly indicates that the soldier voluntarily abandoned his family, which fact must be accepted as an explanation of his absence; consequently the rule laid down in the act of March 13, 1896, has no application in this case. The above-mentioned act enumerates certain facts and conditions under which seven years continued and unexplained absence shall constitute sufficient proof of death. It does not follow, however, that facts and circumstances of sufficient strength to authorize the inference of death in cases of explained or unexplained absence may not be shown. Under the common law the continued and unexplained absence of a person for a period of seven years may, under certain conditions and limitations not now necessary to be enumerated, give rise to the legal presumption of death. Under the act of March 13, 1896, the same facts when established are accepted as sufficient proof of death. But presumptions of fact may arise without regard to the limitation in respect to time fixed by said act in conformity with the rule observed at common law.

In First Greenleaf on Evidence, section 44, the author, in speaking of presumptions of fact, says:

> They are, in truth, but mere arguments, of which the major premise is not a rule of law; they belong equally to any and every subject matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections, which are shown

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by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while those are reduced to fixed rules and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever.

A legal presumption derives its force from the law; a presumption of fact is a logical deduction.

The real issue in this case involves an inquiry as to whether the proven facts in this case are sufficient to create the inference in the mind of a reasonable man that the soldier is dead. There is no evidence in the case tending to show the condition of his health or the state of his constitution at the time of his abandonment, nor is there anything to show that he was surrounded by circumstances that were menacing to his life or health when last heard from. A report from the registration department of the health office of the city of Philadelphia shows that he was 21 years of age at the time of his marriage in 1867. He was, therefore, less than 40 years of age at the time he left his family.

After a careful consideration of the case, I am unable to reach the conclusion that the proven facts do, with moral and reasonable certainty, authorize the inference that the soldier is dead.

Action affirmed.

FRAUD AND MISTAKE—REIMBURSEMENT—EVIDENCE.

SARAH M. DECKER (WIDOW).

The evidence obtained by a special investigation having clearly shown that the diseases of which the soldier died existed prior to his enlistment and that the claimant was in a position to know of their existence, it is held that her claim for pension, on the ground that said diseases originated in the service, was fraudulent, and that the pension under the act of June 27, 1890, was properly withheld for the purpose of recovering the amount paid upon said claim.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 31, 1901.

Sarah M. Decker, widow of Richard B. Decker, formerly a soldier in the Fourth Independent Battery of New Jersey Light Artillery, was, in July, 1876, granted a pension of $8 per month, commencing January 4, 1875, and $2 per month additional from said date to May 1, 1875, for one child under 16 years of age. Her name was subsequently dropped from the pension roll upon evidence obtained by special examination showing that her husband's fatal disease originated prior to his enlistment. She was paid pension to September 4, 1879.

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In 1891 she was granted a pension under the act of June 27, 1890, to commence from July 12, 1890. In 1894 a reissue was made under which the pension agent was directed to withhold payment of the pension until a sufficient amount had accumulated to reimburse the Government for the pension erroneously paid under the old law from January 4, 1875, to September 4, 1879. From that action the pensioner's attorneys appealed on October 14, 1898, inviting attention to a decision said to have been "recently rendered" to the effect that "unless fraud on the part of the claimant is established it was an error to withhold pension under the old law to reimburse the Government for erroneous payments made under another law."

By implication it is contended that fraud on the part of the claimant has not been established in this case, and that is the only issue before the Department.

The soldier was in the military service from December 29, 1863, to April 7, 1864. The records of the War Department show that he was admitted to Emory General Hospital, Washington, D. C., February 11, 1864, with pleurisy, and was discharged from service on April 7, upon a surgeon's certificate of disability stating that he was incapable of performing the duties of a soldier because of phthisis pulmonalis, which existed previous to entering the service.

The soldier filed a claim for invalid pension on August 13, 1869, alleging that while at Camp Instruction, Washington, D. C., about January 20, 1864, he contracted rheumatism and disease of the lungs, and that he now had pulmonary consumption. He died on the 3d of January, 1875. His widow filed her claim February 23, 1875, alleging that he contracted the disease which resulted in his death while in the service and line of duty. Therewith she filed testimony to show that he contracted rheumatism in the legs and hips and general debility while in the service, and on March 6, 1875, she filed medical evidence showing that he died of pleuro-pneumonia and rheumatic pericarditis (acute). Upon this evidence and some testimony as to prior soundness filed by the soldier, in support of his claim, the widow's claim was allowed.

Evidence obtained by a special investigation in September, 1879, showed beyond any reasonable doubt that the soldier suffered from both rheumatism and lung disease prior to his enlistment. The appellant was married to him in December, 1842.

In view of all the facts it can hardly be believed that she was ignorant of the existence of the aforesaid diseases before enlistment (although she still denies that they then existed), or that she filed her claim for pension in 1875 in good faith, honestly believing that the diseases which caused his death were contracted while in the service.

Actual or positive fraud has been held to include "the misrepresentation by word or deed of material facts, by which one exercising

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reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently." (1 Story, Eq. Jur., c. 6.)

It is not necessary, in order to establish fraud, that deceptions or fraudulent concealment be proved by the claimant's own admissions. It may be proved by circumstantial or presumptive evidence. If the evidence is sufficient to satisfy the mind and conscience of the existence of the fraud it will suffice, although it does not lead to a connection of absolute certainty. The fraud need not be proved beyond a reasonable doubt. It is usually a question for the jury, unless the facts are undisputed, when it may become a question of law for the court to determine. (Am. and Eng. Ency. of L., vol. 8, pp. 654–656.)

After careful consideration, I am of the opinion that the facts established in this case are sufficient to justify the imputation of fraud. The action of the Bureau in withholding payment of pension under the act of June 27, 1890, in order to recover money erroneously paid under former laws, is therefore affirmed.

FEE—FEE AGREEMENTS—RERATING.

SAMUEL BENNISON (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

In the absence of valid fee agreements, an attorney is entitled to a fee of $10 for his services for the successful prosecution of a claim for rerating.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 31, 1901.

Milo B. Stevens & Co., of Washington, D. C., May 31, 1899, entered an appeal from the action of the Bureau in the matter of fee on the issue of April 13, 1899, in the claim for pension under the general law, of Samuel H. Bennison, who served in Company H, Fifty-sixth Pennsylvania Volunteer Infantry.

Mr. Bennison was in receipt pension (rank first lieutenant) at the rate of $9 per month under the general law on account of disability from hydrocele of left side, when on May 4, 1897, in his behalf the appellants filed a declaration for increase on account of increase of disability, and for rerating, in which it was alleged that the claimant was serving as captain at the time of incurrence of hydrocele.

Certificate issued April 13, 1899, to correct the claimant's rank from first lieutenant to captain, to allow pension at $10 per month from dis-

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charge, to May 25, 1898, date of medical examination, and $20 per month thereafter on account of disability due to hydrocele.

On said issue the appellants were certified a fee of $10 for their services in securing an allowance of pension in said claims for rerating and increase. They contend that they are entitled to a fee of $10 for securing rerating, and a fee of $2 for securing straight increase.

In the report of the Bureau it is stated, in substance, that the fee in a claim for rerating under the general law is such amount as the Commissioner may see fit to allow, not exceeding $25; that in this claim for rerating a fee of $8 is fully commensurate with the services rendered by the appellants therein, and accordingly said amount was certified to them, together with the sum of $2 for their services in the claim for increase.

Section 4786 Revised Statutes, as reenacted and amended by section 4 of the act of July 4, 1884, provides, among other things, that:

> In all cases where application is made for pension * * * and no agreement is filed with the Commissioner as herein provided the fee shall be ten dollars and no more.

The proceedings for rerating instituted by appellants in behalf of the claimant may properly be termed an application for pension, as their object was to secure for the claimant an allowance of pension. (See case of Davis *v.* Davis, 10 P. D., 409, text.) In the absence of articles of agreement the law directs that the Commissioner of Pensions certify a fee of $10 to an attorney for his services in prosecuting an application for pension. The amount to be certified is specified in the act. The question to be determined by the Commissioner of Pensions is whether the proceedings constitute an application for pension. If they do constitute such an application, then he is to certify the fee that the law directs to be certified in the absence of fee agreements for the successful prosecution of an application for pension, viz, $10. There is no question for the Commissioner to determine as to the amount of fee to be certified under the conditions recited. If he certifies a fee, the amount is that specified by the law.

The appellants are entitled to a fee of $10 in the claim for rerating, and a fee of $2 in the claim for straight increase—in all, the sum of $12. Accordingly the action of the Bureau in refusing to certify a fee of $10 in the claim for rerating is reversed. The decision of the Department in the case of George Aab, deceased (9 P. D., 377), in so far as it conflicts with the rule here laid down, is overruled.

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MARRIAGE—EVIDENCE—PRESUMPTION.

ELIZABETH HENDERSON (ALLEGED WIDOW).

The evidence shows that the soldier had, at the time of his formal marriage to this claimant in 1874, a living and undivorced former wife, who died in 1892, having been insane since 1860.

Held: Said marriage in 1874 was invalid and void, and a valid marriage subsequent to the death of his lawful wife in 1892, his own death occurring in 1896, is not presumable from the circumstances shown.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 10, 1901.

This appellant, Elizabeth Henderson, on November 30, 1896, and February 26, 1897, filed claims, No. 644620, for pension, under, respectively, the act of June 27, 1890, and the Revised Statutes, as the widow of Hamilton Henderson, who was a member, from March 13, 1864, to July 12, 1865, of Company A, Fourteenth Illinois Cavalry, and died November 11, 1896.

Both claims were rejected in September, 1898, on the ground that the claimant is not the lawful widow of the soldier, because at the time of their formal marriage in 1874 he had a former wife living and undivorced.

The claimant appealed September 30, 1898, contending that a valid marriage between herself and soldier arose eo instanti on the death in 1892 of his former wife.

Shortly after the filing of this appeal the appellant died, and the appeal is prosecuted by one Elleanor J. Thayer for the purpose of reimbursement for funeral expenses of appellant, there being, it is stated, no child of hers under 16 years of age.

There is record evidence of this claimant's marriage to the soldier January 1, 1874, in Fabius, Marion County, Mo., and it is testified by several that they cohabited thereafter as husband and wife until his death.

In the claim of minors of James M. Cox, Company H, Eighty-ninth Ohio Infantry (No. 178319), whose widow was alleged to have remarried the soldier in this case in 1866 or 1867, there was filed record evidence also of the marriage, in 1852, of this soldier to one Frances, who was shown, also by record evidence in that claim, to have been, in 1860, adjudged insane, the insanity being due to disease of liver, of seven months' duration, and not hereditary, as found by the inquisition, and to have been incarcerated in insane asylums or almshouses continuously thereafter until her death in August, 1892, said Henderson having apparently abandoned her entirely on her becoming insane.

It was also shown in that claim that the widow of Cox lived with this soldier Henderson from 1866, or 1867, until her death, which was probably in 1868, and she was supposed by some to have married him.

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The claimant in this case then testified, however, that Cox's widow and Henderson were not married, but lived in her kitchen, occupying separate beds; and as he then had a living and undivorced, although insane, wife, there could have been no valid marriage either between him and Cox's widow or between him and this claimant in 1874, or prior to August, 1892, when his insane wife died.

Insanity of a wife or husband is not a cause for divorce either in Missouri, where claimant's marriage in 1874 was contracted, or in Illinois, where they lived thereafter and at his death, although when existing at the time of a marriage it may be ground for annulment of such marriage. As the insanity of this soldier's first wife did not arise until many years after their marriage, it could not have been ground either for annulment of such marriage or for a divorce therefrom, and no ground whatever for a divorce appears, unless it be his own apparent desertion of her, which would not probably have been available, in this case, by either him or her.

It is testified, however, that no divorce from his marriage in 1852 was ever procured, and it is, in fact, tacitly admitted that his marriage to this claimant in 1874 was invalid and void, as it clearly was, because of such prior marriage, the contention of the appeal being that a valid marriage between soldier and claimant arose on the death, in 1892, of his wife Frances.

That the soldier's relations with Cox's widow were wholly illicit can not be doubted, he being as incompetent to contract a lawful and valid marriage with her as with claimant; and his first relations with this claimant can not be characterized by any higher term, for she seems to have been fully aware of the existence of his wife Frances, and to have associated with him, and allowed him to associate in her own house with the widow of Cox freely and openly, notwithstanding his unfortunate absent wife, whom he so flagrantly neglected and abandoned to asylums and almshouses.

If she was willing to live thus illicitly and immorally with the soldier during the eighteen years from their formal marriage in 1874 to the death of his wife Frances in 1892, it must be presumed she would as readily continue living with him without any valid marriage between them, as it is not contended that any actual new contract of marriage was in fact entered into between them after 1892. There being no pure matrimonial intent before, there appears to be no reason for presuming any after, the death of the lawful wife Frances. On the contrary, the presumption is that the illicit relation continued, and under the circumstances shown it must be held that there was no valid marriage between them at any time and that she was not, in law, his widow.

The action appealed from, therefore, is affirmed, and all papers in the case are returned herewith.

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SERVICE—DISCHARGE—ACT OF JUNE 27, 1890.

MARTIN COLLINS.

While soldier's discharge and a report from the War Department show that he served from January 27 to April 14, 1864, other records show him present with his company, assigned to light duty, in "camp sick," and discharged May 21, 1864, it is held that he was actually in the military service from enlistment to May 21, 1864, and therefore in the military service for ninety days during the late war of the rebellion.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 16, 1901.

Your communication of December 28, 1900, inviting attention to and suggesting a reconsideration of decision of this Department of August 31, 1899, reversing the action of the Pension Bureau rejecting the claim of Martin Collins, late a private in Company D, Fifty-fourth New York Volunteer Infantry, for pension under the provisions of the second section of the act of June 27, 1890, has been duly and carefully considered.

Said claim was rejected upon the ground that the claimant did not render ninety days' military service during the war of the rebellion, and you correctly state that the only question at present at issue in the case is whether an actual service of ninety days' duration, within the meaning of the provisions of the second section of the act of June 27, 1890, was rendered by said soldier.

When this case was before the Department on appeal the only evidence in the papers bearing on this question consisted of the reports of the War Department, dated April 8, 1891, and June 27, 1893, respectively, giving the military history of the soldier as contained in the official military records on file in that Department, and the surgeon's certificate of disability upon which he had been discharged the service.

Both reports of the War Department and the certificate of disability showed that the soldier had enlisted on January 27, 1864, and had been discharged on April 14, 1864, covering a period of but seventy-nine days, but it was insisted by the claimant in the appeal that although the muster-out roll and the certificate of disability gave the date of his discharge as April 14, 1864, he was not actually relieved from military duty and separated from the military service until sometime in the following month of May, when his discharge was delivered to him and went into effect, and that in the meantime he was held to military service and was on duty with his company. This contention appeared to be fully sustained and conclusively borne out by the statement in said reports of the War Department that "other records show him" on duty with his company on March 16, 1864, and on April 26, 1864

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(twelve days after the date given in the certificate of disability and the muster-out roll as the date of his discharge), he was assigned to "light duty" with his company, and on April 27, May 1, 2, 3, and 4, 1864, he is borne on the rolls of his company as in "camp sick," and on May 21, 1864, he is reported as "discharged."

These records unmistakably and clearly indicate that the soldier was on duty with his company, with the exception of the days he is reported as sick in camp, and that he was held to military service from March 16 to May 21, 1864, when he was actually discharged from his company and separated from the military service, notwithstanding the fact that the technical date of his discharge, as given in other records, was April 14, 1864. This conclusion appears to me to be inevitable and conclusive from said records, and the facts stated therein are absolutely inconsistent and wholly incompatible with the presumption, suggested in your communication, that during the period intervening between the date of his discharge as given in the certificate of disability and the muster-out roll. April 14, 1864, and the date of discharge as given in said "other records," May 21, 1864, the "soldier chose to remain with his command after his discharge to await transportation north."

So far from such a presumption being "a fair and reasonable" one, it seems to me to be completely and conclusively refuted by the facts stated in said "other records," which were, presumably, the daily reports, returns, and rolls of his company, and are equally as authoritative as to all facts therein stated as the records showing that the soldier was discharged on Apil 14, 1864.

If the soldier was, as you suggest, "simply a hanger-on at hospital and camp, and remained in camp or hospital as before stated after his discharge to await transportation north by steamer," it is perfectly inexplicable that he should have been carried on the rolls of his company during this period as present for duty and as on duty; that he should have been assigned from regular or ordinary duty to "light duty" on April 26, 1864; that his absence from duty, "sick in camp," should have been noted on the rolls on April 27, May 1, 2, 3, and 4, 1864; and that he should have been reported as finally and actually discharged the service and relieved from military duty only on May 21, 1864. There is, besides, not a word of testimony nor a particle of evidence of any kind in the case to sustain such a presumption or tending in any way to show that the soldier remained about the camp of his command after he was actually discharged and relieved from military duty with his company for any period of time whatever, either to await transportation north by steamer or for any other purpose, or showing that he was ever in hospital at any time during his military service.

Neither am I able to concur in your conclusion that the provisions

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of section 4701, Revised Statutes, were not "designed to apply to the case of a soldier discharged on individual muster-out roll where a discrepancy or interval occurred between the date of discharge and the date of the soldier's actual separation from the service." It seems to me that the language of said section necessarily applies directly to and was intended to cover the case of a soldier who was technically discharged or mustered out of the service, but who, as a matter of fact, was held in the service for a longer period, and not actually separated therefrom or relieved from military duty and control until a subsequent date. The words used in said section, "or until their actual discharge for other cause than the expiration of the service of such organization," can only refer to the actual release of the soldier from military duty and control and his actual separation from the service as a matter of fact.

I am, therefore, clearly of the opinion that the conclusion announced in the decision of the Department in this case was fully warranted and justified by the facts shown by the record at that time in the papers and considered by the Department, and upon which said opinion was based.

It appears, however, that since this case was before the Department on appeal the soldier has been called upon to furnish his discharge certificate, and that the same was filed in the Pension Bureau on October 16, 1900. This certificate states that the soldier was discharged the service of the United States on April 14, 1864, and corresponds with the date of discharge given in the certificate of disability and the muster-out roll. Furthermore, on October 27, 1900, said discharge certificate and all the other papers in the case bearing on the question of the soldier's discharge were resubmitted to the authorities of the War Department, for their consideration, and on October 29, 1900, the same were returned by the Chief of the Record and Pension Office of the War Department—

* * * with the information that it has been determined by this Department from the records and from the discharge certificate of Martin Collins, Company D, Fifty-fourth New York Volunteers, that he was discharged the service April 14, 1864, by reason of disability.

The Auditor of the Treasury for the War Department was also called upon on November 10 and 17, 1900, for information whether the soldier had been paid for any period of service subsequent to April 14, 1864, and replied on November 23, 1900, stating that the records of his office failed to show that any payment was ever made to the soldier for any period of his service in said organization.

So far as I am able to discover, these additional matters that have been introduced into the case since it was formerly considered by the Department do not change its status in any important respect, and add

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nothing material to the evidence bearing upon the question of this soldier's "actual discharge" from the service.

The date of discharge given in the discharge certificate was evidently taken from the date given in the certificate of disability and the muster-out roll, and does not afford any explanation whatever of the fact that the soldier is shown by the official records of his company to have been on duty and to have been held to military service, and not actually relieved therefrom nor released from military control and actually separated from the service and discharged, for a period of about thirty-seven days after that date.

The communication from the War Department of October 29, 1900, contains merely a deduction or conclusion of the officers of that Department, drawn from the same facts and based upon the same records that were in evidence before the Pension Bureau and this Department, and is in no sense binding upon this Department in the determination of the length of this soldier's pensionable service under the provisions of the pension laws. The facts shown by the records of the War Department relative to the soldier's service and discharge are binding and conclusive upon this Department, but the deductions and conclusions of the officers of the War Department drawn therefrom are not, and have never been held to be, although such opinions are strongly persuasive and are always to be treated with due consideration and respect.

The reply of the Auditor for the War Department shows that there is no record of any payment whatever having been made to the soldier for any period of his military service, and therefore adds nothing material to the case, and serves to throw no light whatever upon the question of the date of the soldier's actual discharge.

As long as the records of the soldier's company, showing that he was actually on duty, that he was under military control and was not released therefrom nor separated from the military service as a matter of fact from April 14, 1864, to May 21, 1864, stand unexplained, undisputed, and are to be considered authoritative, I am constrained to hold that said latter date must be accepted as the date of his "actual discharge" from the service, and that under the express provisions of section 4701, Revised Statutes, the period of his pensionable service will extend to that date, notwithstanding the fact that the other records hereinbefore mentioned show his discharge on April 14, 1864.

The foregoing views relative to the construction to be given the words "actual discharge," as used in section 4701, Revised Statutes, and as to what constitutes the "actual discharge" of a soldier from the military service, are fully sustained by the opinion of the Judge-Advocate-General of the United States Army, cited in full in the case of Elizabeth H. Poland, widow (8 P. D., 266), and which is cited and

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approved by the Department in the case of David H. Dyer (9 P. D., 87), wherein the question herein involved is exhaustively and elaborately discussed.

For the foregoing reasons the decision in this case of August 31, 1899, will be adhered to, and you are requested to proceed with the readjudication of this claim upon its merits as heretofore directed.

The papers in the case are herewith returned.

DECLARATIONS—JURISDICTION—EXECUTION.

SAMUEL BERRY.

The declaration purports to have been made on August 10, 1888, before the deputy clerk of the circuit court of Macomb County, Mich., but the evidence shows that the same was executed in Grand Traverse County, of said State.

Held, The declaration is invalid.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. January 31, 1901.

On August 10, 1888, Samuel Berry, formerly of Company E, First California Cavalry, filed a declaration for pension under the general law, based upon a disability alleged to be the result of an injury to the back and rheumatism. On June 7, 1890, he filed a similar declaration, based upon substantially the same allegations.

On June 25, 1898, before action was taken upon the merits of the claim, the first declaration was, on account of certain facts disclosed upon special examination, held to be invalid and materially defective.

The declaration purports to have been executed in the county of Macomb, State of Michigan, before Orlando N. Devereaux, deputy clerk of the circuit court of said county. To the declaration is also affixed the seal of the circuit court of Macomb County, State of Michigan. On December 20, 1897, the Bureau of Pensions instituted proceedings indicated by the following letter:

To the CHIEF OF THE SPECIAL EXAMINATION DIVISION.

SIR: Herewith are transmitted the papers in the claim of Samuel Berry, formerly of Company E, First California Cavalry, No. 667901.

A declaration in this case filed August 10, 1888, purports execution by the claimant on July 31, 1888, in Macomb County, Mich., before Orlando N. Devereaux, with M. A. Densmore, of Traverse City, Mich., and P. F. Simmonds, of Maple City, Mich., as identifying witnesses.

You are requested to place these papers in the hands of a special examiner whose district includes Benzie County, Mich., with instructions to take the deposition of the claimant at Osborne, Mich., who should be interrogated as to where and before whom said declaration was executed; whether or not he was in Macomb County, Mich., on or about the date said paper was executed, and any circumstances, within his recollection, connected with the execution of said declaration.

The depositions of M. A. Densmore and P. F. Simmonds, who resided at Traverse

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City and Maple City, respectively, should be taken, and they should be interrogated as to where and before whom the declaration was executed; whether they were in Macomb County, Mich., on or about the date of execution, and any other circumstances connected with the execution of said declaration within their recollection.

This case should be made special, and upon the completion of the investigation the papers should be returned to the law division, this letter appearing as an exhibit to the examiner's report.

In accordance with the directions contained in the above-mentioned letter a special examination was conducted in the month of January, 1898, at which time it was disclosed by the evidence of the claimant and others that the said declaration was not executed in Macomb County, Mich., but in Traverse City, Grand Traverse County, in said State. It appears that on the last of July and first of August, 1888, there was a reunion of soldiers and sailors assembled at Traverse City, and that during the encampment one J. L. Starkwether occupied a tent upon the grounds as a pension attorney. At this time and place said attorney prepared the declaration in question, which was then and there executed in full. The claimant thinks that the name of the person who administered the oath was Thornton, but he is not sure of that. He is not acquainted with Orlando N. Devereaux.

In the light of the facts thus disclosed said declaration was held to be invalid, as hereinbefore mentioned.

Assigning said action as error, appeal was taken on September 19, 1898, resting upon the contention that the claimant was quite unaware of any irregularity touching the manner in which the declaration was prepared and that he should not be held amenable for the blunder of a pension attorney.

This contention is untenable. A client is bound by the acts of his attorney so long as they are confined to the legitimate scope of his duty and obligation under the contract of employment.

Under the law as it stood when the declaration in question was executed, as set forth in section 4714, Revised Statutes, the same had to be made "before a court of record or before some officer thereof having custody of its seal." This declaration purports to have been executed before the deputy clerk of a court of record of Macomb County, in the State of Michigan, but the evidence shows that it was really made in Grand Traverse County, in said State. The jurisdiction of said court was limited to the county of Macomb, and consequently its acts or the acts of its officers outside the limits of said county do not import verity, and are, therefore, void for want of jurisdiction.

The action seems to have been proper, and is hereby affirmed.

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MARRIAGE—EVIDENCE—PRESUMPTION OF DEATH—NEW YORK LAWS.

ANNIE NOTMAN (WIDOW).

Appellant was married to one David King in 1852, in Scotland. Between 1855 and 1856 said King came to the United States, leaving his wife in Scotland; thereafter he sent for her, and in July, 1857, she joined him at Cohoes, N. Y., where they lived as man and wife until October of that year, when on account of the closing of the mill in which he was employed he left home for the purpose of procuring work and has never been seen or heard from since by appellant. In December, 1865, claimant married James Notman, who died May 26, 1892, leaving her without property or means of support.

Held, That claimant was the legal widow of James Notman under the laws of New York and that her claim as such is sufficiently proved under the law as stated in the case of Davie *v.* Briggs (97 U. S., 628), and that under the evidence she is entitled to pension as the widow of said James Notman under the act of June 27, 1890.

The cases of Lavanchia L. Salisbury (7 P. D., 247) and Spicer *v.* Spicer (16 Abb. Prac. Repts.) referred to and distinguished.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 31, 1901.

James Notman enlisted as a private of Company G, Fifth Pennsylvania Volunteer Cavalry, August 10, 1861, and was honorably discharged therefrom as a sergeant August 7, 1865. February 21, 1881, he was pensioned at $3 per month on account of loss of left index finger, and afterwards his pension was increased to $4 per month, which amount he received to the time of his death, which occurred on May 26, 1892.

June 25, 1892, the claimant herein, under the name of Annie Notman, filed two applications for pension, one under the general law and one under the act of June 27, 1890, as the widow of said James Notman. Both claims were rejected by the Bureau on September 30, 1893, on the ground that claimant had no title, having failed to prove the death of her former husband prior to her marriage to the deceased soldier.

March 22, 1894, claimant appealed therefrom to the Department, and on October 30, 1894, the action of the Bureau in rejecting her claim was affirmed.

September 21, 1896, claimant filed a certificate of the register of deaths of Philadelphia, Pa., showing that on January 15, 1859, a man by the name of Dickson King died at that city, aged 30 years.

January 8, 1897, the Bureau held that this certificate could not be accepted as proof of the death of claimant's first husband, whose name was David King.

November 15, 1897, attorney for claimant filed an affidavit of Letitia

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Herron, a sister of David King, claimant's first husband, stating that as far as she knew—

> David King is dead and believe that he is the person buried in Philadelphia, Pa., in 1859, and is on the register of the health office as Dickson King. I have not heard of him since hearing of his death in 1859.

March 8, 1898, the Bureau held that the showing made was not sufficient to warrant any change in the action rejecting claimant's claims, and October 14, 1898, claimant's attorney appealed from the action of the Bureau.

Prior to claimant's marriage to the deceased soldier she was married to one David King, and the material question presented by the appeal is whether her marriage to the soldier was such in character as would entitle her to a pension as his widow.

The undisputed testimony in the case shows that in July, 1852, appellant was married to said King in Scotland, and they lived there together as man and wife for about three years and a half, when the husband came to this country, leaving his wife there. He located at Cohoes, N. Y., where he was employed in a cotton mill. About a year and a half after his arrival in this country he sent for his wife, and in July, 1857, she joined her husband at Cohoes, where they lived as husband and wife until some time in the fall of that year, when the mill at which he was employed was closed on account of the financial stringency prevailing at that time, and her husband was thrown out of employment. In October, 1857, her husband went away for the purpose of procuring work, and claimant has never seen or heard anything definite from him since that time. There was no disagreement nor trouble between them prior to or at the time he left home. His sole purpose in going away was to find employment. Claimant remained at Cohoes and worked away from home, washing and such other work as she could get to do, and supported herself and two children she had by King. She states that she—

> looked forward to the time when he would return or write for me to come to him but no word ever came, and after years of absence I concluded he was dead, or some one would have seen him or I would have heard from him. * * *

Some years after her husband went away a tramp told her that her husband was dead; that he died in a hospital somewhere in Pennsylvania.

Before Notman enlisted in the Army he was acquainted with claimant's husband King, and after his return from the Army he boarded at the house where claimant worked until they were married, in December, 1865. Before they were married they talked over the matter of King's absence, and both believed, as he had been gone for over seven years and nothing had been heard from him, that he was dead. At the time claimant married Notman, King had been absent

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for over eight years, and from the evidence in the case it is clear that both parties to the latter marriage believed that her former husband, King, was dead, and acted in good faith in the premises. James Notman died May 26, 1892, leaving claimant in straitened circumstances and without means of support or property.

The attorney for appellant refers to the case of Frances E. Wyant (unreported), decided by the Department May 19, 1894, and contends that it should govern this case.

Among other things in said case it is said:

In England it has long been settled as a rule of law that a man is presumed to be dead at the expiration of seven years from the time he was last known to be living; and this principle has been followed and adopted by nearly all the courts of the several States of this country. The statutes of New York declare that, "If any person whose husband or wife shall have absented himself or herself for the space of five consecutive years without being known to such person to be living during that time shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time its nullity shall be pronounced by a court of competent authority." (Sec. 6, chap. 8, art. 1, vol. 3, p. 2332, N. Y. R. S.)

In cases like this, section 2 of the act of August 7, 1882, provides that marriages shall be proven—

to be legal marriages, according to the law of the place where the parties resided at the time of marriage or at the time when the pension accrued. * * *

Appellant was married to Notman in the State of New York, and resided in that State when she applied for pension. Under the statute of New York and the circumstances disclosed by the evidence, her marriage to Notman was authorized, and therefore could not be said to be invalid. It is true that such marriage might have been inquired into by a court of competent jurisdiction, and upon a proper showing might have been pronounced void by such court; but so long as the marriage remains undisturbed by a court it must retain all the characteristics of a valid marriage. More than thirty-five years have elapsed since said marriage occurred; and so far as the testimony shows its validity has not been questioned, and there is no presumption that it ever will be annulled. Under these circumstances there is no good reason for holding that said marriage was illegal and thereupon denying claimant a pension, if she is otherwise entitled to one under the pension laws. Stated in another form, the effect of the statute of New York in cases coming within its provisions is to create the presumption that the husband who is absent, unheard of for five years in succession is dead. This presumption having been established by the evidence in the case must be held to continue until it is rebutted or overcome by sufficient evidence.

The question of the validity of the claimant's marriage to Notman was considered when the case was here on the former appeal, and decided adversely to her upon the authority of Lavanchia L. Salisbury (7 P. D., 247) and Spicer *v.* Spicer (16 Abb. Prac. Repts., N. S., 112).

These cases are clearly not in point, as they differ from the case at

bar in their essential facts. In the Salisbury case the claimant had previously been married, which marriage she claimed had been "dissolved by mutual consent." At the time of claimant's marriage to the soldier she had a husband living from whom she was not divorced.

In Spicer *v.* Spicer the plaintiff's claim was based upon the allegation that she was the widow of John Spicer, and the court found that the first question which arose in the case was "whether the plaintiff would have been entitled to dower in lands of which John Spicer might have died seised." The defense was that the marriage to Spicer was void, because Miller, the absent husband, was still living, and said Miller was produced as a witness and testified upon the trial. Under these circumstances the court held that the plaintiff would not be entitled to admeasurement of dower as the widow of John Spicer.

It thus appears that in each of these cases the claimants had living husbands by former marriages from whom they had not been divorced at the times they contracted marriage with the persons under whom they claimed as widows, while in this case there is nothing to show that claimant's husband King was living when she married the soldier.

Since the Department decided this case Congress has seen fit to pass an act regulating proof of death in pension cases providing:

> That in considering claims filed under the pension laws the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received. And any pension granted under this act shall cease upon proof that such officer or enlisted man is still living. (Act of March 13, 1896.)

This practically applies to all pension cases the common law rule as laid down in Davie *v.* Briggs. (97 U. S., 628.)

It follows that the Department erred in its former decision in following the cases cited, and it also follows that the law passed since said decision covers the case under consideration.

The action appealed from is accordingly reversed.

FEE—REFUNDMENT—EVIDENCE—PRESUMPTION.

EDWARD W. STEPHENS (CLAIMANT).

G. W. MITCHELL (ATTORNEY).

After the lapse of several years from the date of an action of the Bureau adjudging that an attorney is entitled to a fee, it will be presumed, when it appears that said attorney performed the material service necessary to earn a fee, that he observed the rules of practice as regards mere formal service.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, January 31, 1901.

G. W. Mitchell, of Peabody, Kans., February 7, 1900, entered an appeal from the action of the Bureau in the matter of fee on the issue

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of October 29, 1895, in the claim for pension under the general law of Edward W. Stephens, who served in Company G, Eighty-ninth Illinois Volunteer Infantry.

Edward W. Stephens was in receipt of pension under the general law at the rate of $24 per month, on account of gunshot wound of breast and lungs and resulting disease of heart, when in his behalf, on April 18, 1889, a claim for straight increase was filed by Legg & Davisson, of Topeka, Kans., which contained a power of attorney in their favor. Said firm was composed of A. M. Legg and R. A. Davisson. The firm was dissolved July 17, 1889, and by a subsequent agreement Mr. Davisson was to be recognized in all pension claims filed in the firm name at the time. On December 20, 1889, the claimant, through a member of Congress, was called upon for evidence showing total inability for manual labor on account of pensioned disability. At the time the call was made notice to a claimant was notice to the attorney; this was the practice until December 30, 1894, the date of the decision of the Department in the case of Calista M. Hardy (7 P. D., 39), when a more equitable rule was laid down. However, the practice at the time said call was made was to require the evidence noted, in a claim for straight increase, when the claimant was in receipt of pension at the rate of $24 per month for other than specific disability: as Mr. Davisson was the original attorney, it was his duty to file evidence showing total disability for performing manual labor on account of accepted cause. He did not file such evidence, and therefore became in neglect at least on December 20, 1890, one year from the date of the aforementioned call of the Bureau, if not at an earlier date: he continued to call up the case.

A. M. Legg, then of Topeka, Kans., September 24, 1889, and February 21, 1890, filed declaration for increase of pension in behalf of Edward W. Stephens, each of which declarations contained a power of attorney in favor of said A. M. Legg. Mr. Legg called up the case many times during the years 1889, 1890, 1891, 1892, 1893, 1894, and subsequently.

In behalf of Edward W. Stephens, the appellant filed March 17, 1890, a declaration for additional pension and for straight increase, and on the same date he filed evidence. He called up the case December 3, 1891, July 28, 1892, and January 3, 1893. The declaration contained a power of attorney in favor of Mr. Mitchell. Of the fifteen affidavits filed by the appellant on March 17, 1890, ten of them, including three medical affidavits, related to the soldier's impaired physical condition, due to causes accepted as of service origin, and tended to show that he was totally incapacitated for the performance of manual labor by reason of disability due to said causes.

A medical examination was ordered through Mr. Mitchell and held February 25, 1891.

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On October 29, 1895, certificate issued to allow the rate of $30 per month on account of gunshot wound of left breast and lung and resulting disease of heart, from date of holding medical examination February 25, 1891. A fee of $10 was certified to him for his services in securing an allowance of straight increase.

On January 22, 1900, the Bureau requested Mr. Mitchell to refund the fee paid him on the issue of October 29, 1895, upon the ground that he had no title to it; that Mr. Legg had prior rights in the case and the fee should be paid to him. Mr. Mitchell has refunded the fee under protest and entered an appeal.

It is very manifest that A. M. Legg has no title to the fee, as he never rendered any material service in securing the pension allowed. He filed a declaration for increase, but such service had been performed by the firm of Legg & Davisson. Mr. Legg did not succeed to the rights of said firm, which were subsequently forfeited by Mr. Davisson. Mr. Legg filed many calls for status, and in 1894 a firm to which he belonged filed some evidence. However, the appellant had filed all necessary evidence in March, 1890. Mr. Legg, therefore, filed only duplicate evidence, a duplicate declaration and calls for status; such services are not deemed material, and in this case were in no way essential in securing an allowance of pension.

The appellant's title to the fee is denied by the Bureau upon the ground that his power of attorney never became operative in the claim for straight increase.

The powers of attorney in favor of Mr. Legg and the power of attorney in favor of appellant were filed at a time when Mr. Davisson was entitled to recognition, and therefore were inoperative when filed. Upon the default of Mr. Davisson the Bureau exercised its prerogative, under the practice then in vogue, and recognized a new attorney, though his power was filed at a time when he was not entitled to recognition. In this case there were two attorneys who had filed powers in their favor. It seems that the Bureau saw fit to recognize the last attorney appointed by the claimant. This would be permissible, as no attorney had any prior rights in the case, for the filing of a power of attorney when another was entitled to recognition did not at the time in question create an inchoate right which could be perfected by calls for status. So, under the practice, it was optional with the Bureau to recognize the appellant. It recognized him, and therefore his power of attorney became operative. Hence the ground assigned by the Bureau for requiring the appellant to refund the fee is not well taken.

My attention has been directed to the fact that there is no evidence that Mr. Mitchell called up the case every year after it was completed until June 16, 1894, the date of the decision of the Department in the case of John S. Keisor (7 P. D., 558). There is no call slip in the case

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bearing an indorsement subsequent to January 3, 1893. Failure to call up a claim for increase under the general law at intervals of less than a year during the period noted would work a forfeiture of rights.

There is nothing to show that Mr. Mitchell did not call up the case subsequently to January 3, 1893, except that now there is no call slip in the case indorsed as filed by him after that date. If no such slip was on file at the time the claim was allowed, its absence would have been noted. At least it must be presumed that the Bureau observed the rules. Inasmuch as the filing of a call for status is not deemed material service after the lapse of several years from the date of an action of the Bureau adjudging that an attorney is entitled to a fee, it will be presumed, when it appears that he performed the material service to earn a fee, that he observed the rules of practice as regards mere formal service.

I therefore fail to discover that Mr. Mitchell forfeited his rights to the fee by reason of neglect of the case. The action of the Bureau in paying the fee to appellant should not have been disturbed after the lapse of so many years as had passed by before he was called upon to refund the fee that was paid to him, unless it clearly appeared that some person had better title to the fee than Mr. Mitchell had, and whose rights had been ignored by the Bureau. The Bureau having determined title to the fee, it should not question the judgment therein unless the evidence of error is specific. Any person who deems that he has better title to the fee than the person to whom the fee was paid by the Bureau has his remedy by appeal to this Department. In this case it appears that Mr. Mitchell's title to the fee is perfect; therefore the action of the Bureau in requiring him to refund the same is reversed.

SERVICE—MEXICAN WAR—ACT JANUARY 29, 1887.

THOMAS MCGINNISS.

The mere fact that claimant served as a sailor during the war with Mexico is not enough to entitle him to a pension under the act of January 29, 1887, but he must have served sixty days in Mexico, on the coasts or frontier thereof, or en route thereto, or actually engaged in battle, or been personally named by a resolution of Congress for specific service rendered therein.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 11, 1901.

February 15, 1897, Thomas McGinniss filed an application for a pension under the act of January 29, 1887, as a survivor of the war with Mexico, alleging that on or about the 8th day of May, 1846, he enlisted at Boston, Mass., as a seaman for the term of three years, and was

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honorably discharged at Gosport, Va., February 27, 1849; that he actually served with the Navy of the United States—

in Mexico, or on the coast or frontier thereof, or en route thereto in the war with that nation, which service was as follows: I served on the guardship *Ohio*, was sent to United States frigate *United States*, from thence to Africa, thence up the Mediterranean, back to Africa, and to Gosport, Va.;

that he was 67 years of age, having been born in 1830. In an affidavit filed November 27, 1897, claimant states that he is 72 years old and wholly disabled for the performance of manual labor.

March 9, 1897, your Bureau requested the Auditor of the Navy Department to state what evidence the records of his office afford of the service of claimant, and May 11, 1897, he reported that—

Thomas McGinniss, O. S., enlisted on the *Ohio* May 8, 1846, and served to May 21, 1846, and was discharged from the *United States* February 27, 1849.

January 24, 1898, the Bureau rejected McGinniss's claim on the ground that the ships on which service was rendered were not in Mexican waters during claimant's service.

October 17, 1898, claimant's attorney appealed to the Department from the action of the Bureau rejecting his claim. Said attorney contends in the appeal:

That having enlisted for service in the Mexican war, and having served honorably for over two years, being at all times subject to the orders of his country and his officers, it would be unjust and lacking in equity, and bad law (in my opinion), to hold that he was not entitled to the benefit of a service in Mexican war.

The facts found by the Bureau that the ships on which McGinniss served were not in Mexican waters during his service are not in any manner called in question, disputed, nor denied in the appeal.

The act of January 29, 1887, provides—

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll the names of the surviving officers and enlisted men, including marines, militia, and volunteers, of the military and naval services of the United States who, being duly enlisted, actually served sixty days with the Army or Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto, in the war with that nation, or were actually engaged in a battle in said war, and were honorably discharged, and to such officers and soldiers and sailors as may have been personally named in any resolution of Congress for any specific service in said war, and the surviving widow of such officers and enlisted men: *Provided*, That such widows have not married: *Provided*, That every such officer, enlisted man, or widow who is or may become sixty-two years of age, or who is or may become subject to any disability or dependency equivalent to some cause prescribed or recognized by the pension laws of the United States as a sufficient reason for the allowance of a pension, shall be entitled to the benefits of this act. * * *

The evidence in this case clearly fails to bring the claim within either the spirit or letter of the act of January 29, 1887. There is nothing in the record furnished by the Navy Department to show that either of the vessels upon which claimant served had any direct connection

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with or formed any part of the military or naval operations in the war with Mexico. Said record shows that claimant enlisted on the *Ohio* May 8, 1846, and served upon it for thirteen days, and was discharged from the *United States* February 27, 1849. The mere fact that claim ant served as a sailor during the war with Mexico is not enough to entitle him to a pension under the act of January 29, 1887. Said act requires sixty days' service in Mexico, on the coasts or frontier thereof, or en route thereto, or actual engagement in battle, or personal mention for specific service in said war, to give title to pension thereunder. (See Joseph Shattuck, 7 P. D., 54.) These requirements have not been shown in this case, and it follows that there was no error in the action of the Bureau in rejecting McGinniss's claim, and the same must be, and hereby is, affirmed.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—MENINGITIS.

REBECCA C. MORGAN (WIDOW).

The late officer was pensioned under the general law on account of a gunshot wound which destroyed the right eye and fractured the bones of the orbit. His death is shown to have been due to disease of the brain or meningitis.

Held, That in the absence of any other more probable cause for infection than the continued disease in the orbit, the fatal disease was caused primarily by the gunshot wound. Action reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 7, 1901.

Rebecca C. Morgan, widow of Isaac N. Morgan, late second lieutenant of Company B, First Maine Heavy Artillery, filed a claim for pension under the general law on the 28th day of May, 1891, alleging, among other things, that her late husband died on the 1st (31st) day of March, 1891, from the effects of a wound received in the military service of the United States.

The said claim was adjudicated September 11, 1893, and rejected on the ground that the soldier's death resulted from acute meningitis, not shown to be due to cause which has been legally accepted as of service origin, to wit, loss of right eye and injury to the left eye, result of a gunshot wound.

An appeal therefrom was entered on the 19th day of August, 1897, and on the 26th day of November, 1897, the Commissioner of Pensions reported to this Department that the claim was reopened for further consideration and special examination, and the appeal was accordingly dismissed.

The claim was readjudicated and rejected October 4, 1898, on the ground that the soldier's death resulted from disease of brain, not due to cause which has been legally accepted as of service origin, to wit, loss of sight of right eye and injury to left eye, result of a gunshot wound.

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This appeal was entered October 11, 1898, wherein the appellant contends that according to the recognized medical authorities an injury of the cranial bones is the most frequent cause of acute meningitis, and that the evidence on file is sufficient to prove that the soldier's death resulted from the gunshot wound of service origin.

The soldier was pensioned according to rank on the 25th day of October, 1864, at $10 per month, commencing August 15, 1864, on account of loss of right eye and injury of left eye, result of gunshot wound. On the 8th of November, 1865, the rate was increased to $15 per month, commencing September 4, 1865, and on the 12th day of December, 1884, to $24 per month, third grade, under the act of March 3, 1883. The soldier had a claim for increase pending at the time of his death, March 31, 1891, but had not received a medical examination under the said claim.

The medical records show that the soldier was treated as follows: May 22 to June 3, 1864, for gunshot wound of right side of face, the ball entering over right eye and making its exit in front of ear; the wound was received at the battle of Spottsylvania, May 19, 1864; furloughed June 3, 1864; returned August 6, 1864; transferred August 8, 1864; August 8 to 17, 1864, gunshot through orbital process of right side; frontal bone; discharged from service August 17, 1864, per S. O., No. 271, A. G. O., August 15, 1864.

Before the soldier was discharged he was examined by a board consisting of L. P. Graham, brigadier-general of volunteers; T. Hendrickson, major, of the United States Army, and G. S. Palmer, surgeon, of the United States Volunteers, at Annapolis, Md., and on the 10th day of August, 1864, the following report was furnished:

The board find this officer (Isaac N. Morgan) now suffering from the effects of a gunshot wound of the right eyelid and frontal bone; the eye has suppurated and is gone. Several fragments have been discharged from the frontal and temporal bones; the sight of the left eye is injured by sympathy. The wound is not healed and the patient suffers much pain. The board is of the opinion that this officer will not be fit for duty again in the field and they recommend that he be discharged from the service.

The examining surgeon at Bangor, Me., September 5, 1864, under the original claim for pension, reported as follows:

The bullet entered above the inner angle of the eye, fracturing the supraorbital ridge, destroyed the eye, and was removed about an inch in front of the ear. The cicatrix at upper edge or orbit is about 3 inches long. He has much pain through the forehead and exercise in hot sun causes giddiness and dimness of vision in the left eye, and pain.

At the next examination, September 15, 1865, the examining surgeon made the following statement, after describing the wound:

He has much pain in the forehead and any exposure to the heat of the sun or exercise causes giddiness and severe pain in the other eye and dimness of vision. The anterior half of the scalp of right side of head is numb.

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At the next examination, January 4, 1873, the following report was submitted:

He has lost the eye of the right side; the bullet was extracted. The orbit was badly fractured and there is considerable deformity. There is a constant semipurulent discharge from the orbit. The left eye is weak and the power of adaptation to different distances is considerably impaired, though the appearance of the eye to an ordinary medical observer is normal. The injury is equivalent to the loss of a hand or foot for purposes of manual labor.

At the examination, September 17, 1875, and September 4, 1877, the soldier was reported to have complained of pain and numbness of forehead and giddiness.

The last medical examination of the soldier, December 15, 1886, about four years and three months before the fatal attack, was reported as follows:

We find the right eye has been removed, stump in good condition. Find cicatrix along superior border of right orbit from supraorbital notch to right temple. The supraorbital notch is enlarged and the bone roughened the whole length of superior border. Right temple seems very tender. Left pupil unusually dilated, but reacts to light. Find obstruction of left lachrymal duct, causing tears to run over margin of lid. * * * Find slight deafness of right ear. Function of left ear normal.

Dr. F. B. Adams stated under oath, June 17, 1891, that he, in company with Dr. Estabrook, saw the soldier in his last illness, and at that time he was suffering undoubtedly from inflammation of meninges of the brain, accompanied with typhoid symptoms, and in the affiant's opinion the soldier's death was due to inflammation of the brain and meninges.

In a letter under date of December 8, 1892, the above-named affiant made the following statement:

In relation to claim No. 514195 of Rebecca C. Morgan, as widow of Isaac H. Morgan, will say that on the 25th of March, 1890, I was called there and found the said Isaac N. Morgan suffering from severe headache, pain in the back, and tenderness in the right iliac fossa, and his temperature at that time, so far as I can recollect, was 102. On the 27th of March I was called, and found him very sick, temperature at 104, and somewhat delirious at times, complaining of considerable pain in the head. On the 28th I was called again to see him in consultation with Dr. Williams, of Rockland, and found him very delirious during the day, at that time so that he didn't know anything, and on the 28th Dr. Estabrook was called in consultation, and we found him more delirious on that day and continued so to the day of his death. On the 30th Dr. Estabrook was called again in consultation; found him about the same on that day—delirious. On the 31st Dr. Horne, of South Thomaston, and Dr. Lorensaeler, of Thomaston, were called, and on that day he died, along in the afternoon. He was delirious all the time.

I think the immediate cause of his death was inflammation of the brain and its meninges, but whether or not it was originally caused by the wound which destroyed the right eyeball, and bone inclosing it, I am unable to say positively.

When this witness was called to testify on special examination, July 28, 1898, he stated, among other things, as follows:

I attended Isaac N. Morgan, of South Thomaston, from March 25 to the 31st, inclu-'ve, 1891, when I called to see soldier and found him confined to the bed, suffering

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from a high fever, temperature 102 or 103 degrees, complaining of pain in his head. I am positive as to the pain in the head. He was delirious at times during his sickness. There were typhoid symptoms present. I was somewhat in doubt, as I was young in practice, so I called in consultation Drs. Estabrook and Williams. Dr. Horn, of South Thomaston, and Dr. Lorensaeler, of Thomaston, were called by claimant, and not when I was there. Yes, they were, too. It is my impression that the bowels were somewhat swollen; his temperature was above the normal right along. Claimant stated that at night the soldier was so delirious that he had to be held in bed; that he picked the bed clothes, especially during the last part of his sickness.

Q. What history did you get of the case when you were first called in?—A. His wife simply told me that he complained very much of his head where he had been wounded over the eye, as I now recall. I made no examination of the eye or its surrounding parts. I think it was Dr. Estabrook's opinion that soldier was suffering from meningitis. I did not analyze his urine; it was highly colored. Do not recall now whether the quantity was normal or not. The last day, March 31, he died; he was in a comatose state. I saw him in the forenoon of the day he died. I do not recall his temperature that day, but I think his bowels were swollen. I could not say whether I detected any symptoms of uræmia. I do not recall that he had convulsions; no smell of urine about him. From my subsequent experience in typhoid fever cases I should say that all the symptoms of the disease were not present in Morgan's case, as I now remember. It was my opinion at the first it was typhoid fever, but Estabrook differed from me. I do not recall what opinion Drs. Williams and Lorensaeler expressed.

Q. Now, Doctor, can you give me the grounds on which you base the opinion that soldier was suffering from inflammation of the brain?—A. The only thing that I can say is that I judged from the duration of the sickness, only about a week or ten days, the intense pain that he complained of in the head in his lucid moments, and Dr. Estabrook's opinion. I leaned upon said physician, as I was young in practice.

Dr. Thomas L. Estabrook made the following statement under oath, May 26, 1891:

I saw Isaac N. Morgan several times during his last illness. He had evidently been suffering from inflammation of the meninges of the brain, accompanied with typhoid symptoms. I think the immediate cause of his death inflammation of the brain and the meninges.

On the 5th day of December, 1892, the witness made the following statement in a letter to the Commissioner of Pensions:

I was but a consulting surgeon in the case of Isaac N. Morgan, late lieutenant of Company B, First Maine Heavy Artillery. I saw him but three times before he died. His symptoms when I saw him were as follows: He had complained of some pain and intolerance of light, as I learned from the nurse, and was evidently suffering from meningitis; talking incoherently, picking the bedclothes, very restless, twitching and delirious, pulse rapid, only lived three days after I saw him. I feel assured that he died from inflammation of the brain and its meninges. I have no doubt in my own mind that the wound which destroyed the right eyeball and part of the inclosing bone was probably the cause of the disease of the brain and its meninges and finally the cause of his death.

When called on special examination July 28, 1898, he testified as follows:

My books show I visited soldier March 28, 1891, in consultation with Dr. Adams, and again March 30, 1891, alone. I am under the impression that I saw soldier three times, twice in consultation with Dr. Adams.

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When I first saw soldier, March 28, 1891, I found him confined to the bed in a semiconscious state, tossing somewhat about the bed. He had all the symptoms of typhoid fever, but the fullness and tenderness of bowels were lacking. I took his temperature by inserting the instrument in his mouth. His temperature was high above the normal, but can not give the degree. His wife told me that at nights he would pick at the bedclothes. I did not analyze his urine, but his wife showed me the urine and I found he had passed the normal quantity of urine. His lungs were normal. I do not think Dr. Adams had any pronounced opinion as to the disease of the patient. I thought he must be suffering from meninges of the brain from the history of the case as given me by the wife, she stating he suffered intense pain in the head, over the eye, where he was wounded. She stated he had been working in the shop at night and took cold. I made no examination of the wounded eye; as I recall the stump looked healthy. When I saw him March 30 his pulse was very rapid. I forget his temperature; he was unconscious at times. I managed to wake him up for a minute, but he relapsed in the unconscious or comatose state. He had no convulsions that I saw. I found no symptoms of uræmia. * * * Taking all the facts in consideration I hardly believe the soldier had typhoid fever. * * * I can give no other grounds than stated for the opinion that soldier died from meningitis, which may have been due to the wound of the eye.

Dr. Horn stated on special examination, June 27, 1898, that he was then unable to state what was his diagnosis of the soldier's fatal disease.

Dr. Williams, another consulting physician, stated, when called to testify on special examination, that he did not discover marked symptoms of typhoid fever, but was unable to recall the disease from which the soldier was suffering when he saw him in his last illness.

The widow, in her testimony before the special examiner, stated, in reference to her husband's fatal illness, that about Saturday, March 21, 1891, he commenced complaining of his head—a pain through his head, especially on the right side, where he was wounded. On Sunday he still complained of his head, and on Monday he took to his bed and soon became delirious. She remembers that when he was delirious blood ran out of the wounded socket; that he tried to clutch his eye socket while delirious, as if in pain. He had to be held down in bed by main force. Every little sickness he had in the past seemed to affect his head; always complained of his head paining him.

The medical referee submitted the following statement November 2, 1900:

The appeal in this case relates to the rejection, in 1898, of the widow's claim under the general law. The claim had been previously rejected in 1893, and when it was reconsidered in connection with the previous appeal it was reopened in order that a special examination might be made to determine definitely the conditions which preceded the fatal illness, the nature thereof, and the immediate cause of death.

The late officer was pensioned for the loss of his right eye and injury of left eye, results of a gunshot wound, and these conditions were legally accepted in the widow's claim. His death occurred March 31, 1891, after an acute illness of about ten days, during which febrile and cerebral symptoms were most marked. There appears to have been some differences of opinion among the several physicians who were called to the case, and the affection was diagnosticated as typhoid fever by some and acute meningitis by others, while still another physician is said to have suggested that the trouble was uræmia. The evidence adduced by the special examination was not

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conclusive upon this point, but the history of the case warrants the conclusion that in any event there was no pathological relation between the fatal illness and the remote gunshot wound.

In the appeal reference is made to medical authorities as showing acute meningitis is frequently caused by injuries of the head; but the fact that this effect is immediate and not remote has been ignored.

The action appealed from is adhered to.

To recapitulate, the late officer is shown to have received a gunshot wound which destroyed the right eye and fractured the bones of the upper part of the orbit, and there was subsequent loss of bone.

It is further shown by the official reports of the examining surgeons of the Bureau that as late as January, 1873, there was a purulent discharge from the wounded orbit. The widow states that during the fatal illness there was a bloody discharge from this part. It is noted that this condition was not mentioned by any other witness, but there is no evidence that such was not the fact.

In the last declaration for increase filed by the late pensioner, November 8, 1890, less than four months prior to his death, he alleged that he suffered with pain in his head as a result of the wound. He was not examined under this claim, but had he been his statement as to the existence of pain in his head could not have been verified by any physical condition. This allegation, however, has value in determining the merits of the claim.

The entire history of the case indicates that at no time was the late pensioner free from symptoms indicative of disease in parts in proximity to the wound, and it has been concluded by the medical officers of the Bureau that death resulted from cerebral meningitis or disease of the brain.

Idiopathic inflammation of the meninges of the brain must be a rare condition; indeed, it is doubtful if it ever takes place. Focal meningitis or encephalitis may be unquestionably caused by an extension from some neighboring inflammatory focus, as an orbital disease, or by the invasion of pyogenic organisms.

In the absence of any other more probable cause for infection than the continued disease in the orbit, as evidenced by continued pain and discharge, it must be concluded the fatal disease was caused primarily by the gunshot wound.

For the reasons stated the adverse action is reversed and the papers in the case herewith returned, with the request that the claim be readjudicated and allowed.

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JURISDICTION—DIVORCE—DECREE—RECORD.

ANNIE M. SHIPP (WIDOW).

The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Indiana while she resided in Arizona. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known. This statutory requirement being omitted, it is fatal to the jurisdiction of the court.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 8, 1901.

On July 28, 1900, the Department rendered the following decision:

William T. Shipp, late of Company K, Ninth United States Infantry, died on January 2, 1897, being at the time borne upon the pension roll under the general law at the rate of $17 per month by reason of a disability resulting from disease of heart the result of rheumatism, disease of the rectum, and dyspepsia.

On December 8, 1898, Annie M. Shipp filed a declaration as the widow of said soldier, alleging that his death resulted from his military service. (No. 716436.)

Her claim was adjudicated on July 6, 1900, and rejected on the ground that the soldier in his lifetime obtained a divorce from her in the State of Indiana, on November 20, 1894.

Assigning said action as error, appeal was taken on July 14, 1900, contending that, after having made her application for pension, claimant was informed that her husband had obtained a decree of divorce from her in the State of Indiana, and that pension was being paid to another woman who claimed to be his widow; that claimant had never been served with any notice of a divorce proceeding against her on the part of her husband, and that her husband at the time of said decree had not been a resident of the State of Indiana for six months, whereas the law of said State requires two years' residence in order to give the courts thereof jurisdiction to render a valid and legal decree of divorce, and for that reason it is contended that said decree is void and of no binding force.

It appears that the claimant was notified in writing on April 6, 1900, by the Commissioner of Pensions, as follows:

"In response to your letter of February 3, 1900, returned herewith, you are advised that it appears of record in this Bureau that William T. Shipp, late a corporal of Company K, Ninth United States Infantry, was divorced from Annie Shipp on November 20, 1894, by decree of the circuit court of Johnson County, Ind.; that he remarried Effie Sandefer in Indiana on February 5, 1896, with whom he lived until his death January 2, 1897, and who is now pensioned as his widow. The evidence upon which Mrs. Shipp's claim was allowed appears to have been regular in all respects, and as the validity or invalidity of the divorce is a question which does not come within the jurisdiction of this Bureau, I am unable to afford you any relief in the premises."

It appears that Mrs. Effie Shipp, the second wife of the soldier, who is now pensioned as his widow, filed her claim on February 17, 1897, shortly after his death. Accompanying her declaration is the following document offered in evidence for the purpose of establishing the existence of a divorce of the soldier from the claimant in the case at bar:

STATE OF INDIANA, *Johnson County, ss:*

Be it known, that on the 20th day of November, 1894, being the second judicial day of the November term, 1894, of the circuit court of Johnson County and State of

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Indiana, before the Hon. W. J. Buckingham, judge of said court, the following proceedings were had in the cause of William T. Shipp *v.* Annie Shipp, No. 1681—Divorce.

Comes now said plaintiff, by his attorneys Miller and Barnett, and shows to the satisfaction of the court by the notice and affidavit of A. N. Crecraft, proprietor and publisher of the Franklin Weekly Democrat, a newspaper of general circulation, printed and published in the city of Franklin, Johnson County, Ind., that due and legal notice has been given said defendant to answer to said complaint by three publications in said paper, the first of which was on Friday, the 28th day of September, 1894, and the last on Friday, the 12th day of October, 1894, which notice and affidavit reads in words and figures as follows, to wit. (Here insert.) And now on plaintiff's motion the defendant, Annie Shipp, is three times loudly called in open court but comes not, but wholly makes default herein.

Thereupon this cause coming on for trial is now submitted to the court for trial without the intervention of a jury, and the court, having heard the evidence and the argument of the counsel and being sufficiently advised in the premises, now finds that the bonds of matrimony heretofore and now existing between this plai tiff and defendant ought to be dissolved, set aside, and held for naught, and that said plaintiff ought to be divorced from the defendant.

It is therefore ordered, adjudged, and decreed by the court that the bonds of matrimony existing between this plaintiff and defendant be and they are hereby dissolved, set aside, and held for naught, and they are hereby divorced each from the other.

STATE OF INDIANA, *Johnson County, ss:*

I, Charles Byfield, clerk of the circuit court of Johnson County, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the proceedings had in said court, and entered on the records thereof in the above-entitled cause on the day and year first aforesaid, as appears of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court, at my office in the city of Franklin, this 9th day of March, 1897.

CHARLES BYFIELD,
Clerk Circuit Court, Johnson County.

The foregoing paper, which purports to be a judgment of divorce obtained in the circuit court of Johnson County, State of Indiana, gives the case an aspect in the nature of a contest between two claimants for pension, each claiming to be the widow of the soldier. It is a well-recognized principle of law, which obtains in many cases, that where it appears that a person has been twice married the law interposes the presumption that each marriage was valid and lawful, which implies, of course, that the relation which resulted from the first marriage had lawfully terminated at the time when the second marriage was celebrated. The case at bar, however, does not come within the domain of such presumption. The claimant under the second marriage sets up a specific judicial proceeding evidenced by the foregoing document as a legal fact which shows the termination of soldier's first marital relation before he entered upon the second. The claimant in the case at bar contends that what purports to be a judgment of divorce which constituted the ground of rejection of her claim is a mere nullity and should have been so treated in the adjudication of her claim. It is a commonly recognized principle of jurisprudence that a judgment of a court of competent jurisdiction imports verity, and can not be attacked except upon proper proceedings instituted in the court which rendered the judgment. It is also equally true that anything which purports to be a judgment of a court of competent jurisdiction, but which is affected with an inherent infirmity clearly showing a want of jurisdiction, is absolutely void, and can be attacked at all times and by any person at interest and treated as a nullity.

Section 1051, Revised Statutes of the State of Indiana, is as follows:

"Divorce may be decreed by the superior and circuit courts of the State, on petition filed by any person who at the time of filing such petition is and shall have

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been a bona fide resident of the State for the last two years previous to the filing of the same and a bona fide resident of the county at least six months immediately preceding the filing of such petition, which bona fide residence shall be duly proven by such petitioner to the satisfaction of the court trying the same by at least two witnesses who are resident freeholders and householders of the State; and the plaintiff shall, with his petition, file with the clerk of the court an affidavit, subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the State, and stating particularly the place, town, city, or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed."

Section 1055, Revised Statutes of said State of Indiana, is as follows:

"The clerk of the court in which such petition is filed shall issue a summons for the defendant to appear and answer said petition, which summons shall be personally served on said defendant, if a resident of the State, either by reading or leaving a copy thereof at his or her usual place of residence, such usual place to be the residence of such defendant at the time the copy is left."

Section 1056, Revised Statutes of said State, is as follows:

"If it shall appear by the affidavit of a disinterested person that the defendant is not a resident of this State, the clerk shall give notice of the pending of such petition by publication for three successive weeks in some weekly newspaper of general circulation published in such county, or if there be no such paper, then in one published in this State nearest the county seat of such county: *Provided*, That the plaintiff shall, in case such notice is to be given by publication as aforesaid, before the same is given, file his or her affidavit, if such residence be known to the plaintiff, and if such residence be unknown to the plaintiff such affidavit shall so state, and in case such affidavit state the residence of the defendant the clerk shall forward by mail to such defendant the number of the paper containing such notice, with the notice marked."

Now, it will be observed that the soldier must have been a bona fide resident of the State of Indiana for two years next preceding the institution of divorce proceedings by him. That material fact, which was necessary to be alleged and proven in order to give the circuit court of Johnson County jurisdiction in the case, does not appear in what purports to be the judgment of divorce offered in evidence by Effie Shipp, the second wife of the soldier. In her application she relied upon the fact that the soldier had obtained a divorce from his former wife, but the evidence offered by her does not recite the jurisdictional facts, which, under the statutes of Indiana, are necessary to empower a circuit court of that State to render a valid and binding decree of divorce. It may be true, and perhaps the presumption of law in favor of the validity of the judgment in question obtains, that the complete record of the divorce proceedings would supply the jurisdictional facts concerning which the decree is silent, but under the view which I take of the case the claimant was entitled to the benefit of the whole record in the adjudication of her claim. There is evidence on file which strongly tends to show that soldier was not a bona fide resident of the State of Indiana for the period of two years next preceding the institution of divorce proceedings. The judgment or decree of divorce in evidence was obtained, it appears, on November 20, 1894. The first publication made in the Franklin Weekly Democrat was inserted on September 28, 1894. On January 3, 1893, the soldier filed an application for increase of pension, at which time he appears to have been an inmate of the Soldiers' Home located in the District of Columbia. On May 8, 1894, a similar application was filed by the soldier, at which time it also appears that he was an inmate of said institution. Soldiers' Home, District of Columbia, is therein given as his post-office address. On December 27, 1894, the soldier filed an affidavit,

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in which he said: "I was in the Soldiers' Home at Washington, D. C., from April, 1892, to June, 1894."

Now, it will be observed that the requirement of the Revised Statute of the State of Indiana is to the effect that an applicant for divorce shall file an affidavit "stating particularly the place, town, city, or township in which he has resided for the last two years past," etc. If that record is true the soldier could not truthfully have made any such statement. It will be noticed that the statute above mentioned requires residence, not citizenship, for two years in order to give the courts of that State jurisdiction in matters of divorce. But it appears that the soldier was a resident of the District of Columbia from 1892 to June, 1894.

The contention of the claimant in this case is that the soldier did not reside in the State of Indiana for as much as six months prior to the time when he instituted divorce proceedings against her, and that she has never received notice of any such proceedings. It will be observed that the statute above referred to contemplates the personal presence of a person in the State of Indiana for the period of two years in order to give jurisdiction to the courts in a divorce proceeding on behalf of such person. This provision of the statute is in harmony with the legal signification of the word "residence," which is defined by Bouvier to be "personal presence in a fixed and permanent abode."

"It is a familiar and universal rule that a judgment rendered by a court having no jurisdiction of either the parties or the subject-matter is void and a mere nullity, and will be so held and treated whenever and wherever and for whatever purpose it is sought to be used or relied on as a valid judgment." (Black on Judgments, vol. 1, sec. 218.)

"It is an axiom of the law that judgments entered without any jurisdiction are void and will be so held in a collateral proceeding, and there is a strong and growing tendency in all the courts to hold that although a court had jurisdiction over both the person and the subject-matter, but did not have the jurisdiction to enter the particular judgment entered in the case, such judgment is void and may be collaterally impeached." (American and English Encyclopædia of Law, vol. 12, p. 147.)

Referring to this doctrine in a footnote the same authority says:

"This is hornbook law, and the following cases are simply cited as illustrating the principle that such judgments will be held void in a collateral proceeding."

Among the cases therein cited is the case of Louisville, New Albany and Chicago Railway Company *v.* Hubbard, 116 Ind., 193.

"A void judgment is always subject to collateral attack, and it can derive no legal sanction from lapse of time." (Paul *v.* Willis, 69 Tex., 261.)

"The judgment of a court having no jurisdiction of the person and subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." (Code of Ga., 1882, sec. 3594 and sec. 3828.)

In view of the universal trend of the authorities on the question involved in this case I am of the opinion that the application of the claimant was erroneously rejected on the ground stated. The action complained of is, therefore, reversed, with instructions that a special examination be conducted with a view of obtaining a full and complete transcript of the record of the divorce proceedings hereinbefore mentioned, including the petition, affidavits, and all other proceedings, in writing and of record. Let the special examiner also take evidence for the purpose of ascertaining whether the soldier was a bona fide resident of the State of Indiana for two years next preceding the institution of divorce proceedings by him against the claimant; and the term bona fide resident involves an inquiry as to whether he was personally present in said State during the period mentioned.

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After the report of such special examination has been returned let the case be readjudicated in accordance with the principles herein announced, and if the Bureau adheres to its former decision let the papers be forwarded to the Department for further consideration.

This case has been made special, in view of which a prompt and speedy compliance with the instructions is requested.

In compliance with instructions, a full and complete transcript of said divorce proceedings has been obtained, including all matters of record in the circuit court of Johnson County, Ind. Besides the petition for divorce and the decree hereinbefore fully recited the record of the case contains the following affidavits:

STATE OF INDIANA, *Johnson County, ss:*

William T. Shipp, being duly sworn according to law, upon his oath says that he is now and for thirty-eight years last past has been a bona fide resident of the State of Indiana; that for two years last past he has been a bona fide resident of Needham Township, Johnson County, in said State, and his occupation is an invalid and pensioner of the United States of America.

WILLIAM T. SHIPP.

Subscribed and sworn to before me this 22d day of September, 1894.

CHARLES BYFIELD,
Clerk of C. C.

STATE OF INDIANA, *Johnson County:*

George Dawson, being duly sworn according to law, upon his oath says that Annie Shipp, the defendant in the foregoing petition for a divorce, is a nonresident of the State of Indiana, as he is informed and verily believes, and that affiant has no interest in this writ.

G. W. DAWSON.

Subscribed and sworn to before me this 22d day of September, 1894.

CHARLES BYFIELD, *Clerk of C. C.*

STATE OF INDIANA, *Johnson County, ss:*

William T. Shipp, being duly sworn according to law, upon his oath says that he is the plaintiff in the foregoing petition for a divorce and that the defendant, Annie Shipp, is a resident of Tempe, Maricopa County, Ariz., as he verily believes.

WILLIAM T. SHIPP.

Subscribed and sworn to before me this 22d of September, 1894.

CHARLES BYFIELD, *Clerk of C. C.*

The evidence taken by the special examiner also shows that the soldier enlisted in the State of Indiana on November 29, 1872, and was continuously in the service until June 30, 1891, when he was discharged at St. Francis Barracks, Fla. On April 16, 1892, he was admitted to the Soldiers' Home in the District of Columbia, from which institution he was discharged at his own request on August 2, 1893. He was again admitted to that institution on March 12, 1894, and, at his own request, was a second time discharged on June 1, 1894. Immediately after this second discharge it appears that he went to the State of Indiana, where he began divorce proceedings in the month of September, 1894, about three months after his arrival in that State. The decree, it will be remembered, was obtained at the November term, 1894, of said court. From 1872, the date of soldier's enlist-

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ment, up to the month of June, 1894, there is no evidence that he was ever in the State of Indiana except on a short furlough after the expiration of the first five years of his military service.

The special examiner who procured the transcript of the divorce proceedings also took the depositions of Mrs. Nicey J. Lusk, the sister of the soldier, Corda Goff, his niece, G. W. Dawson, his brother-in-law, and Mrs. Effie Shipp, now pensioned as his widow, all of whom reside in the State of Indiana, Johnson County, in which the divorce in question was obtained. The testimony of the three first-mentioned witnesses shows that the soldier had not been in said State for at least sixteen years prior to the year 1894. It appears, therefore, that both parties at interest have had notice of the proceedings, have been fully heard, and are both aware of the existing status of the case.

It also appears from the deposition of Effie Shipp that when the soldier went to the State of Indiana in 1894 he located at the home of his sister in the town of Franklin, in which she, too, at that time resided; that she had known the soldier from childhood; that he resided at the house of her father prior to his enlistment and visited there one time after he last came to the State, before he began his divorce proceeding. It seems, therefore, that she was at the time of her marriage fully advised of the fact that the soldier relied upon the validity of the divorce in question as legal authority on his part to contract a second marriage.

There is no contention whatever that the soldier when he went to Indiana in 1894 ever concealed the fact that he was a married man, but, on the contrary, at his instance, a notice of the divorce proceedings was three times published in the Franklin Weekly Democrat, a newspaper of general circulation published in Franklin, the town in which Mrs. Effie Shipp resided. That published notice was a matter of common knowledge in the community and, among other things, conveyed the information that Annie Shipp, the claimant in this case, was not a resident of the State of Indiana. When Mrs. Effie Shipp was married to the soldier, therefore, she knew that the lawful quality of the relation then assumed was dependent upon the validity of a divorce obtained in the State of Indiana against a person who was a nonresident. These facts eliminate any favorable consideration which might arise from an equitable view point of the case.

In the light of the facts hereinbefore recited the case was readjudicated on January 17, 1901, and the former action adhered to upon the same ground as that upon which the claim was originally denied. The papers are now before the Department for further consideration.

The defendant in the divorce proceedings in question was a nonresident of the State of Indiana and was therefore beyond the territorial limits of the jurisdiction of the court which rendered the decree.

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In such a case the statutory requirements must be strictly complied with and all the jurisdictional facts must affirmatively appear on the face of the proceedings.

Section 1051, Revised Statutes of the State of Indiana, fully recited above, provides that the bona fide residence of the petitioner shall be shown "to the satisfaction of the court trying the same by at least two witnesses who are resident freeholders and householders of the State." In this respect the record of the proceedings obtained by the special examiner is silent. The provision of this statute was interpreted in the case of Powell *v.* Powell (53 Ind., p. 513). The syllabus on that point is as follows:

> Where, in an action for divorce, the residence of the petitioner is not proved as required in section 7 of the act of March 10, 1873, regulating the granting of divorces (2 Rev. Stat. 1876, p. 326), the court has no power to decree a divorce.

In the body of said decision it is held that:

> Divorces may be decreed by the superior, circuit, and common pleas courts of this State on petition filed by any person who, at the time of filing such petition, is and shall have been a bona fide resident of the State for at least two years previous to the filing of the same, and a bona fide resident of the county at the time of and for at least six months immediately preceding the filing of such petition, which bona fide residence shall be duly proven by such petitioner to the satisfaction of the court trying the same, by at least two witnesses, who are resident freeholders and householders of the State.
>
> It will be observed, from the language of this section, that the bona fide residence of the petitioner in the State for two years, and in the county in which the petition may be filed for six months at least immediately preceding the filing of such petition, is a jurisdictional fact, which ought to be averred in a petition for divorce, and which must be duly proved by the petitioner, to the satisfaction of the court trying the cause, by at least two witnesses who are resident freeholders and householders of the State, before such court will have any power or authority to decree the divorce.

In considering this feature of the case, the legal question involved therein was disposed of by the Commissioner of Pensions in his approval of the opinion of the chief of the law division as follows:

> It is to be noted from an inspection of a copy of the divorce proceedings in the soldier's suit against the claimant, Anna E., that the affidavit of two freeholders as to his residence in the county and State is not with the record. It is to be presumed, however, that such affidavits were filed in the cause.

In the present investigation that question may be waived. The evidence of two freeholders required in a divorce proceeding, it will be observed, had reference solely to the manner in which the court acquired jurisdiction over the person, not of the defendant, but of the petitioner.

The main question in this investigation involves an inquiry into the manner in which the court might legally acquire jurisdiction over the person of the nonresident defendant, the claimant in the case. The petitioner, William T. Shipp, made affidavit to the effect that the

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defendant, Annie Shipp, was, at the time he filed his petition, a resident of Tempe, Maricopa County, Ariz. Whenever the nonresidence of a defendant shall thus be made known to the court, section 1056, Revised Statutes of the State of Indiana, hereinbefore fully recited, makes it the duty of the clerk of the court before which the case is pending to forward by mail to such defendant the number of the paper containing the published notice. In that respect also the record of the divorce proceedings is silent.

No presumption can be invoked in aid of a judgment or decree of divorce where the defendant has at all times been outside of the territorial limits of the court which rendered the same. In such a case the jurisdictional facts must affirmatively appear upon the face of the proceedings. This principle is clearly announced in vol. 12, page 271, Am. & Eng. Encyclopædia of Law, as follows:

A court of general jurisdiction proceeding within the general scope of its powers is presumed, in a collateral proceeding, to have had jurisdiction in the cause until the contrary appears.

The presumption, however, extends only to jurisdictional facts, concerning which the record is silent. When the record states the evidence or makes an averment as to a jurisdictional fact, that averment or its conclusion from such evidence will not be questioned, but when the defendant appears from the record to have been without the court's territorial jurisdiction, lawful service will only be presumed when the record shows he appeared and defended.

The principle was again announced as follows:

Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of the common law—that is, in the usual form of common law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought—the same presumption of jurisdiction will usually attend the judgments of the court as in cases falling within its general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. Galpin *v.* Page, 18 Wall. (U. S.), 350.

In the case of Gray *v.* Larrimore, 2 Abb. (U. S.), 542, the same doctrine is announced, as follows:

While a court may obtain jurisdiction over persons without the territorial limits of its jurisdiction, yet it would appear that the presumption in such cases is not quite the same as in cases where the parties are within those territorial limits. Thus, in a case where it appeared from the record of a judgment in a State court that at the time of an alleged personal service on certain defendants they lived beyond the reach of process from that court, and it did not appear from the record that they had appeared and defended, or were actually within the territorial limits of the court's jurisdiction at the time service was made on them, a United States court held that the presumption that the parties had been duly served with process ceased, and that the burden of proving jurisdiction over them was thrown upon the parties who invoked the benefit of the decree entered in the case.

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The doctrine that a court, in acquiring jurisdiction over the person of a nonresident who resides beyond its territorial limits, shall strictly comply with the statutory requirements is a very wholesome and salutary provision of law, and its wisdom is clearly illustrated by the peculiar facts and circumstances of this case. The claimant was residing in Arizona, as was stated in the affidavit of the petitioner, and if a copy of the paper containing the published notice of the divorce proceedings had been mailed to her, as required by statute, the probabilities are that she would have received the lawful notice contemplated. She appeared before a special examiner in September, 1900, at which time she deposed to the effect that the first notice she ever had in relation to the divorce proceedings was contained in a copy of the Franklin Star, which she received in December, 1894, setting forth the fact that the divorce had been granted. If notice had been mailed to her, as required by statute, then it would have been incumbent upon her to have interposed her defense before the rendition of the judgment, and thus would have been avoided the unhappy conditions attending the present controversy. It is a very serious and a material matter to have the social and legal status of a nonresident affected during life by the judgment of a court of another State, and it is certainly a wise provision of the law that extra territorial jurisdiction, conferred by statute in derogation of the common law, should be exercised in absolute compliance with such statute.

This case is controlled by the decision in the case of Emma M. Cooper (10 P. D., 434), wherein it is held that—

The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Colorado, while she resided in the State of Massachusetts. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known. This statutory requirement being omitted, it is fatal to the jurisdiction of the court.

The action complained of is therefore reversed, with directions that the case be readjudicated in accordance with this opinion, and action be promptly taken in view of the fact that the case has been made special.

MARRIAGE—EVIDENCE—PRESUMPTION OF DEATH.

WESLEY BUCKLER ET AL. (MINORS).

1. Claimant's first husband left her about the year 1856, without any ostensible reason, except to go up the Wabash River, and has never been heard of by his relatives and friends since. There is no evidence in the case that would justify the conclusion that said husband intended to forsake, renounce, or relinquish his concern or interest for said claimant, and it is held that under the act of March 13, 1896, the facts warrant the presumption that said first husband was dead at the date of claimant's marriage to soldier, ten years after the departure of said first husband, and that said marriage was valid and she is his legal widow.

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2. Where no record of deaths is in existence in a particular jurisdiction, testimony of two credible witnesses as to the date of death of a person, giving good reasons for fixing a certain date as the date of such person's death, will be accepted as sufficient proof of the date thereof.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 11, 1901.

Wesley et al., as minors of Braxton Buckler, formerly a private in Company H, Fourteenth Iowa Volunteer Infantry, filed their declaration under the general law on April 5, 1890, claim being rejected on September 23, 1897, in the following terms, viz:

On the grounds of claimants' inability, aided by special examination, to show the date of soldier's death, or that they are the legitimate children of soldier. The mother of minors had been previously married to one Ambers, who left her, and his whereabouts or death since said abandonment can not be ascertained.

A special examination was held in this case, and it is shown that the mother of claimants, Mary Jane, died in 1884. It appears by the testimony of her sister and niece that at some date, probably as early as 1853, the said Mary Jane married one Vanbrun Ambers. For some reason unknown to said affiant Ambers left his wife, certainly as early as 1856, probably earlier, and was never afterwards heard from. The mother returned to her sister's home in Illinois, and in 1858 she, with her sister's family, removed to Kentucky. In 1866 the mother of claimants remarried. Her second husband was the within soldier and the father of the claimants herein, and the marriage was by ceremony shown by witnesses of said marriage. They lived together as man and wife until the year 1875, when soldier died.

While a number of witnesses who testified to the death of soldier could not fix the date and others varied some little, yet two witnesses do fix it as March 17, 1875. C. C. Dodson, a man of good reputation for veracity, testifies to said date and gives good reasons for his being able to do so. Affiant was sick at the time, and returned from Sulphur Springs on the 18th of March, 1875, and knows that soldier died on the previous day. This affiant had been personally acquainted with soldier since 1854. A cousin of claimants, Mary E. Milner, testifies as to the same date. She gives no special circumstance which recalls said date, but says she knew at the time the date on which he died and has always remembered it. She was 20 years of age at the time.

As to the date on which soldier died it must be admitted that it is proven as well as the circumstances permit. He died in an evidently not thickly settled county of Kentucky, Carlisle, and no record of death appears to have been preserved if such a record was ever kept. It is in evidence that the county records were all destroyed by the burning of the court-house in 1880. Two witnesses of good reputation have testified to the same date, and the basis of their knowledge

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is the same as is usual in such cases. It is therefore concluded that soldier died on March 17, 1875.

The question of the legitimacy of claimants depends upon the validity of the marriage of their mother with soldier. That the mother was married to one Ambers a few years prior to 1856 can not be doubted; and Ambers's departure in 1856, together with his continued absence since that t me, is as well proved as it could be at this late date. Only two persons interviewed appear to know anything about Ambers. One, the sister of claimants' mother, and who was about 20 years of age when Ambers departed, testified that Mary Jane and her husband, Ambers, lived with her and her husband. That thereafter they went up the river near Paducah and lived for a while. That later on, certainly as early as 1856, Ambers left his home without any ostensible reason, and Mary Jane returned to affiant's house. On cross-examination she stated that she knew of no cause for Ambers's departure, and she never knew of any difficulty between him and his wife. That he went off up the Wabash River and no one heard of him afterwards. Mary Jane continued to live with this affiant in Illinois until 1858, when they all moved to Ballard County, Ky., and so lived until 1866, when her sister married the within soldier at her house. She is positive that this last marriage was at least ten years after Ambers's departure, and futher states that all the family, including her sister, supposed and believed that Ambers was dead. The only way in which she can account for Ambers's departure is because both he and her sister were young. It is shown by evidence not heretofore referred to that Mary Jane was probably about 14 years of age when she married Ambers, and that she was not over 17 years of age at his departure. Affiant is positive that no one ever heard from Ambers after he went up the Wabash River, and it is observed that she would doubtless be in a position to know, for her sister lived with her for ten years succeeding his departure.

Affiant's daughter is the only other witness who can throw any light on this phase of the subject. This witness was a very small child when her aunt returned to her mother's house, but she recalls seeing her cry over the matter. She also testifies that none of the family ever heard again from Ambers, and that all interested believed him to be dead.

This is a case in which a presumption of death is involved, the rule as to a presumption of death being laid down by the United States Supreme Court in the case of Davie *v.* Briggs (97 U. S., 678), and is as follows, viz:

> A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard from him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.

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In the present case it is shown that Ambers, for no special reason disclosed by the evidence, nor for any reason that can be deduced from the circumstances, left his wife about the year 1856, and was never thereafter heard from. That after a space of ten years at least Ambers's wife married the within soldier, and became the mother of the claimants herein, and remained his wife until his death on March 17, 1875; and the issue narrows itself down to the question as to whether Ambers should be presumed to be dead. If such a presumption can legally attach, then his wife had a legal right to marry the soldier, and the issue of such marriage would be legitimate.

In discussing this question it is first observed that the terms of rejection refer to Ambers's departure as an "abandonment" of claimant. Such word appears to be used as an equivalent of "desertion," and if the evidence showed a desertion, then the rejection would be sound; for it has been held by the Department that a presumption of death can not be founded upon an act of desertion. (Helen L. Pepper, 9 P. D., 500.)

In order for a case of desertion to be made out it must be shown that the party not only actually left or abandoned his family, but it must further be shown that there was a genuine intention in the mind of such person to desert his family. In this connection it is remarked that not everyone who leaves his wife and child unprovided for, and for even a long length of time, does so with the intent to desert and abandon them. The circumstances surrounding the departure must be shown to be such as would warrant the conclusion, to a candid and impartial mind, that the party intended to withdraw his support and to abandon and desert them; or, as is the full significance of the term, "to give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with, concern in, interest for, control of, or the like." (Webster's Dictionary.) It must be confessed that the evidence as to Ambers's departure is very meager, and the cause or causes that led up to it have not been shown. But, inasmuch as you have, under the evidence that has been adduced, attempted to form a legal conclusion, it is the duty of the Department to review such conclusion, and it does not appear that the evidence warrants a holding that Ambers deserted or abandoned his family within the true legal meaning of the term. No intent to absolutely give up his family, or to forsake his wife, or to relinquish all connection with her, or interest in, has been shown. It has simply been demonstrated that he went away in 1856. Not only the very essence of desertion has not been shown, but what little evidence there is in the case upon this feature is not of such a nature as to warrant a presumption of desertion or abandonment.

It is, therefore, held that, so far as the issue of abandonment has played any part in the rejection of this claim, the evidence does not warrant the conclusions reached by you.

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It only remains to apply the rule cited in Davie *v.* Briggs to the facts in evidence, and it is again remarked, that while the evidence bearing upon such application of the rule is extremely meager, yet you have seen fit to draw a conclusion from such evidence; and it is also quite probable that said evidence is all that can be obtained regarding an event which transpired at least forty-four years ago, in a sparsely settled section of the country, and which few persons would naturally be cognizant of, and in which the person most interested died in 1884.

The foundation of the rule cited is laid in that natural, inherent, and instinctive love that all persons have for those near and dear to them, and in the general observance of all of their duty to bear the responsibilities of the domestic relations cast upon them while living in a state of civilization. The rule lays down the doctrine that if, during the space of seven years, no tidings are heard of an absent person by those who naturally would hear of him, then it will be presumed that such absent person is dead; but it includes a limitation to the application of such a doctrine in any given case, to the end that the circumstances of the given case must be such that they do not account for this continued unheard-of absence.

In applying this rule to the case at bar we are first to discover, under the evidence in the case, whether there was any reason or cause for the departure of Ambers. An analysis of the evidence fails to disclose any reason for Ambers's departure, and it is impossible to deduce from the meager circumstances narrated any cause for his departure. He is said to have been young at the time; we know his wife was not over 17 years of age, and numberless reasons might be given for his departure, none of which would be traceable to an intention to desert his wife. We can not presume this man deliberately abandoned his wife unless there is at least some evidence on which to base such an inference. In the absence of such evidence, and it is absent in this case, the presumption is that he did not so intend.

We are next to inquire if there are any circumstances in evidence which would account for his continued absence. All that can be said upon this issue is that he was never heard of after his departure, and it naturally follows that, as a legal proposition, there is nothing in the evidence which accounts for his continued absence. The evidence discloses only two persons who would naturally have heard from him. One is dead, but the other party, a sister of the deceased wife, and one with whom Ambers formerly resided and with whom the wife lived uninterruptedly for ten years after the departure, testifies strongly to the fact that nothing was ever heard from him thereafter, and that all the family believed him to be dead. The testimony is corroborated by affiant's daughter, who naturally would have heard the matter talked of and who would have been considerably interested as she advanced

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in years. A departure of the husband of one member of a family would be a natural topic of conversation and discussion in such a family, and as there is nothing in the evidence whereby we can infer that secrecy would have been observed in the matter, it is reasonable to believe that if Ambers ever had been heard of such knowledge would have come home to the two affiants mentioned.

All presumptions, either of law or fact, are based upon facts, and before a presumption can obtain proper facts on which such a presumption is based must be in evidence. There is no natural presumption that, under ordinary circumstances, a husband or wife will desert or abandon one another. A normal condition of the domestic relation being shown, or in the absence of any circumstances whereby it could be reasonably inferred that the domestic relation was not normal or natural, the presumption is squarely against any intention to desert or abandon when one departs from home, and such a presumption will continue to attach until it is shown that the domestic tie was abnormal, and then such a condition must be followed up by evidence showing that the abnormal condition was such or of such a nature as to make it possible that the party intended to desert.

Such is the logic of the rule in Davie *v.* Briggs, supra, and it is applied under such an analysis in the present case.

It should be noted that the discussion herein of the rule in Davie *v.* Briggs, as applied, is confined wholly to a supposed abandonment or desertion and under a normal condition of the domestic relations. Such a case should not be confounded with one wherein, although the domestic relation is normal, there are other influences or conditions which might and often do cause one to depart from his home and not return for a long space of time, if ever, and to keep secret his whereabouts. An abnormal domestic relation is not the only cause for which individuals leave their homes and attempt to lose their identity and conceal their whereabouts for a long period of years, and often for the remainder of their lives. Each case must therefore stand on its own footing and the rule applied to the peculiar circumstances surrounding each case.

The Department concludes, under the evidence, that Ambers must be presumed to have been dead at the end of seven years from 1856, that his wife had a legal right to marry the soldier, and that the claimants herein are the legitimate children of Braxton Buckler, the soldier herein. It further concludes that said soldier died on March 17, 1875.

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SERVICE—ENLISTMENT—MILITARY AGE.

EDWARD E. NAPIER.

This claimant being over 18 but under 21 years of age at the date of his enlistment in June, 1861, such enlistment was valid and binding upon him; and any disability incurred by him during the term of such enlistment but after his desertion therefrom and while serving in the United States Navy was not contracted in line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 15, 1901.

This appellant, Edward E. Napier, on January 28, 1890, filed a claim, No. 15959, for pension on account of wound of right thigh, alleged to have been received in April, 1863, while serving in the United States Navy.

The claim was rejected in May, 1896, on the ground that the "claimant was not discharged from one of his rebellion services;" the records of the War Department showing his desertion August 8, 1861, from Company I, Seventh Missouri Infantry, in which organization he enlisted June 3, 1861.

On October 29, 1898, he appealed, through his attorneys, who contend that this rejection is erroneous and not in accordance with the decisions of the Department in cases of John Norton, 9 P. D., 382, and Jasper M. Stine, ibid., 488, because the alleged wound was incurred, they say, subsequent to the term for which claimant enlisted June 3, 1861, and because he was, at that enlistment, an infant 20 years of age, "and had the right to repudiate such contract of enlistment."

Both of these decisions cited were rendered in 1898, long after the action appealed from herein. The claimant should have, therefore, if he believed such action was no longer tenable because of said decisions, first applied to the Commissioner of Pensions before appealing to this Department in the matter.

The case is one readily disposed of, however, on its merits. The records of the War Department show that this claimant's enlistment in June, 1861, was for three years, his company being mustered out July 14, 1864. His two reenlistments in the Navy, therefore, on August 14, 1861 (from which he was discharged July 15, 1862), and on January 24, 1863, were during this term of his original enlistment in the Army; and this term was yet subsisting at the time he alleged he was wounded, in April, 1863. He was discharged from his second naval service August 24, 1863.

Under the decision in the case of John Norton, therefore, the alleged wound must be held to have been received when not in line of duty, as he was then in a state of desertion from his original enlistment; and

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his claim would be properly rejected under that decision, on the ground that the alleged wound was not incurred in line of duty.

His attempt to avoid this first contract of enlistment is equally futile. He alleges he was then 20 years of age. As shown in the decision in the case of Jasper M. Stine, cited, officers were empowered by act of Congress of December 10, 1814, to enlist persons between the ages of 18 and 50 years, and such enlistments were declared by that act to be "binding upon all persons under the age of 21 years;" but, by the act of September 28, 1850, the Secretary of War was ordered to discharge from service any soldier who was under 21 years of age at the time he enlisted, upon proof that such enlistment was without the consent of parent or guardian.

Under these laws, which were in force at the time of this claimant's enlistment in June, 1861, it is clear that such enlistment was valid and binding upon him, as expressly declared by the act of December 10, 1814. He was, at the time of that enlistment, of serviceable age under the law, and the enlistment bound him legally in the service; and the only legal means of escape from such enlistment was by a military discharge, whether under the act of September 28, 1850, upon proof that his enlistment was without the consent of parent or guardian, under any other law, or for any other reason.

The muster-out roll of the company shows him as still in desertion, and no discharge from that service has ever been granted him by the War Department. He was not in line of duty, therefore, at the time he alleges he received this wound, and rejection of the claim is affirmed upon that ground.

DISLOYALTY—SECTION 4716, REVISED STATUTES—ACCRUED PENSION.

ANNA M. WINKLER (WIDOW).

Pension having erroneously been granted to the soldier under the act of June 27, 1890, he having aided and abetted the late rebellion against the authority of the United States, section 4716, Revised Statutes, positively prohibits the payment of the pension that may have accrued to him to the date of his death to his widow.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 19, 1901.

I have carefully considered your communication of December 14, 1900, inviting attention to decision of this Department of December 5, 1900, affirming on appeal the rejection by the Pension Bureau of the claim of Anna M. Winkler for pension under the provisions of the third section of the act of June 27, 1890, as widow of Joseph Winkler (deceased), late a private in Company G, Forty-first Missouri Volunteer Infantry, and also of the application of said widow to be paid the pension that had accrued upon the certificate of her deceased husband

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at the time of his death, who had been a pensioner under the provisions of the second section of said act, and requesting instructions additional to those contained in said decision.

The claim of said widow for pension in her own right under the provisions of the third section of the act of June 27, 1890, was rejected upon the ground that it was shown that the deceased soldier had rendered voluntary military service in the Confederate Army, thus voluntarily aiding and abetting the late rebellion against the authority of the United States, and payment of pension to his widow was prohibited by the provisions of section 4716, Revised Statutes; but payment of the pension that had accrued upon the certificate of the soldier at the date of his death was denied said widow upon the ground of her "inability to prove title as legal widow of soldier."

The Department, in said decision, affirmed the rejection of the claim for widow's pension upon the ground stated, but held that the ground upon which the widow was denied accrued pension was erroneous and improper, the proof being ample and sufficient to establish a valid marriage between the soldier and herself, and that she was the soldier's lawful widow; at the same time it was also held that the soldier himself having, by reason of his Confederate service, been erroneously pensioned, and not being legally entitled to the pension which had accrued upon his certificate at the date of his death, the same could not lawfully be paid to his widow, the prohibition contained in section 4716, Revised Statutes, that—

no money on account of pension shall be paid to any person, or to the widow, children, or heirs of any deceased person, who in any manner voluntarily engaged in, or aided or abetted, the late rebellion against the authority of the United States,

forbidding the payment of accrued pension to the widow just as positively and expressly as it prohibited the payment of pension to her in her own right.

It is this latter holding in said decision to which attention is invited and concerning which additional instructions are desired.

You cite The Rules of Practice of the Pension Bureau, approved April 9, 1898, on page 117, under the head of "General Instructions," as follows:

1. When a claim for pension was allowed under the practice prevailing at the time of its allowance, and there is no evidence of fraud, or mistake of fact, such adjudication will not afterwards be disturbed for the reason that such practice has been abrogated or modified by subsequent rulings or decisions.

This rule applies to questions of original title to pension and not to the rate of pension.

If, however, in such cases an application is filed for increase or additional allowance of pension upon the same basis as the original allowance was made, such application will be rejected on the ground that under existing rules title to original pension could not be granted upon the facts shown, and therefore an increase of pension or an additional allowance on the same basis is not warranted.

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Relative to the foregoing rule of practice you state:

This rule was designed to apply to certain classes of cases, and among others to pensioners under the act of June 27, 1890, who, though having served in the Confederate army, had been pensioned under rulings of the Department holding that such service was no bar to pension under said act. Accordingly, the Bureau has so applied the rule, and where pension under said act was granted prior to September 17, 1894 (the promulgation of decision in the case of Job White, 7 P. D., 312), such allowance will not now be disturbed even though it is shown that pensioner rendered voluntary service in the Confederate army.

In this case pension was allowed in April, 1891. There was no fraud or concealment on the part of the soldier, who was not required to state whether or not he had served in the Confederate army, that fact being deemed immaterial at the time of the allowance of his claim. If said pensioner were now living the rule cited would prohibit the Bureau from dropping his name from the roll on the ground mentioned.

You also call attention to the decision of this Department in the case of William Wilson (10 P. D., 232), wherein the rule of practice referred to was considered at length, and was approved as being "founded in good policy and sustained by long-established rulings in similar cases."

You further state:

Under the practice and rules as construed in this Bureau, the claim for accrued pension in this case would be allowed—claimant's legal widowhood being conceded; and if the Department approves, such action will now be taken.

After very careful consideration of the subject I am unable to concur in the view that the rule of practice referred to was designed to apply to or that it could properly be applied to the cases of pensioners under the act of June 27, 1890, who, though having rendered voluntary service in the Confederate army, had been pensioned under rulings of this Department holding that such Confederate service was no bar to pension under said act.

Said rule, by its very terms, would seem to have been intended to prevent the subsequent reopening and disturbing the adjudication of pension claims, which had been adjudicated in accordance with the practice and decisions in force and prevailing at the time, only in cases where there was no positive and explicit statutory legislation governing the question at issue, but the claims had been allowed upon the construction given to the law by the decisions of the Department, or the rulings of the Bureau of Pensions on some doubtful point, or where the language of the law governing the case was open to and a proper subject for judicial interpretation and construction, and such construction and interpretation had been abrogated or modified by subsequent decisions and rulings.

This seems clearly to have been the view taken as to the scope and intention of said rule of practice in the decision of this Department in the case of William Wilson (10 P. D., 232), to which you invite attention. This was the case of a pensioner under the provisions of the general pension law, in which there was a record of desertion from a

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prior term of service standing against him on the records of the War Department, and the question presented for decision was whether a claim for increase of pension based upon the disability of accepted service origin for which he was then pensioned could properly be rejected upon the ground of said desertion. At the time of the original allowance of the pension the service in which his disability had been contracted was recognized by the decisions of the Department and the rules of practice of the Pension Bureau as legal, and disability incurred in line of duty therein as pensionable. Subsequently a modification of the decisions and a change of the rules of practice resulting from a different construction of the law would not have permitted of the allowance of said pension de novo, for the reason that the service was then held to be illegal and the disability nonpensionable. The decision referred to held, and this is all that it did hold directly, that as long as the name of the pensioner was kept on the rolls and he was permitted to receive pension on account of said disability he could not be denied an increase of pension on account of an increase of said disability solely upon the ground that the original allowance of his pension would not be permissible under the present rules of practice and the construction of the law. In other words, the ground of rejection of increase going to the very foundation of the pensioner's title to pension, he could not be denied increase and at the same time be permitted to continue to receive the pension he was then enjoying. The question of the effec of a charge of desertion upon the title to pension under the provisions of the general pension law is one concerning which there has never been any direct, positive, and explicit legislation by act of Congress, and consequently there has been, from time to time, great contrariety and variance of opinion and decision and frequent changes and modifications of the rules of practice on this subject, growing out of differing views as to the proper construction and interpretation to be placed upon the law, and the present holding and ruling of this Department on the question of desertion is more a matter of implication and construction than a fixed and invariable rule.

It was in this connection and in discussing its application to questions and cases of this character that said rule of practice was stated in said decision to have been "founded in good policy and sustained by long-established rulings in similar cases," and it is manifest from its whole scope and tenor that it was never intended by said decision to extend the application of said rule to any other class of cases. There is nothing in said decision, or in any other decision of this Department, so far as I am aware, that tends in the slightest degree to sustain the view that where Congress has by positive, direct, and explicit legislation commanded something to be done or prohibited something from being done, any rule of practice or decision of this

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Department can operate to annul, modify, or in any way affect such statutory command or prohibition.

The distinction between the two classes of cases is well illustrated by the decisions and rulings of the Department and the practice of the Pension Bureau relative to this very question of desertion itself.

While there has been great divergence of opinion and ruling as to the effect of desertion upon title to pension under the general law, where there is no explicit enactment of Congress on the subject, there has been practical uniformity of both decision and practice with regard to the effect of desertion in claims under the act of June 27, 1890. (See case of John Norton, 9 P. D., 385.) In the latter instance, Congress having declared, by positive and explicit enactment, that an honorable discharge was necessary as a prerequisite to title to pension under said act, desertion from the service therein designated has uniformly been held to constitute a complete bar to the allowance of pension under its provisions.

The case we are now considering, and the case of any other pensioner or applicant for pension under the act of June 27, 1890, who may be shown to have voluntarily engaged in or to have aided or abetted the late rebellion against the authority of the United States is widely different, however, from the case of Wilson (supra). Congress has seen fit in this class of cases to impose, by section 4716, Revised Statutes, a positive, distinct, and absolute prohibition against the payment of any money on account of pension to any person, or to the widow, children, or heirs of any deceased person, concerning the intent and effect of which there can be no two opinions, and the langauge in which it is expressed is so plain and obvious that it does not admit of construction or interpretation.

There never has been any doubt expressed or any contrariety of opinion in the decisions of this Department as to the meaning, intent, or effect of section 4716, Revised Statutes; it speaks for itself in a manner that can not be misunderstood. The contrariety of opinion and decision to which you allude was merely as to whether the provisions of said section were properly applicable to pensioners and claimants for pension under the act of June 27, 1890.

It having been definitely settled and determined that the provisions of said sect on were applicable to such pensioners and claimants for pension, and such being now the established holding of the Department, the positive prohibition therein contained attaches and becomes operative eo instanti, and it necessarily follows that the payment of any money on account of pension under said act to the persons designated in said section 4716 would be a direct and palpable violation of the terms of said section and absolutely and wholly illegal.

Consequently, I am clearly of the opinion that the application of

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said rule of practice to the cases of "pensioners under the act of June 27, 1890, who, though having rendered voluntary service in the Confederate Army, had been pensioned under rulings of the Department holding that such service was no bar to pension under said act." thereby authorizing the continuance of payment of money on account of pension to such pensioners in direct violation of the positive enactments of section 4716, Revised Statutes, was a misapplication of said rule and a misinterpretation of its true meaning and intent, and that the practice of the Pension Bureau thus established is illegal and should be at once abrogated.

It does not appear to me to be open to discussion that the payment of accrued pension to a widow upon the death of her husband, the pensioner, would be just as much the payment to her of money on account of pension as the payment to her of original pension as the widow of such deceased pensioner. If this be conceded, as it necessarily must, then the inhibition contained in section 4716, Revised Statutes, attaches to the payment of accrued pension to the widow under the circumstances of the case under consideration and absolutely forbids such payment.

To deny to this widow pension in her own right under the provisions of the third section of the act of June 27, 1890, upon the ground that the payment of such pension to her is prohibited by section 4716, Revised Statutes, on account of the voluntary Confederate service of her deceased husband, and at the same time pay to her the pension that had accrued upon his certificate under the same act at the date of his death would be, in my judgment, inconsistent and in violation of the express provisions of the law.

The decision of December 5, 1900, on the appeal in the claim No. 673285 of Anna M., as widow of Joseph Winkler, late a private in Company G, Forty-first Missouri Volunteer Infantry, for pension under the third section of the act of June 27, 1890, will, therefore, not be modified or changed in any particular, but will be adhered to, and you are requested to conform the practice of the Pension Bureau in all similar cases, and in all cases arising under the act of June 27, 1890, to the views herein expressed.

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DEPENDENT PARENT'S CLAIMS—SECTION 4707 R. S.—FEE—WAR WITH SPAIN.

KATHRINA BLITCH (MOTHER).

1. Where a dependent parent's claim was filed and prosecuted wholly under section 4707, Revised Statutes, and calls were made by the Bureau of Pensions for evidence of dependence at the date of the soldier son's death, and the proof furnished establishes dependence at date of soldier's death, and the provisions of section 1 of the act of June 27, 1890, have in no manner been invoked, it is error to issue the certificate, upon the allowance of the claim, under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890.
2. In such a case the attorney prosecuting the claim should be certified such fee as agreed upon, evidenced by properly executed duplicate fee agreements filed in the claim, not exceeding $25.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 20, 1901.

Kathrina Blitch, as dependent mother of Nicholas L. Blitch, who served as private in Company A, First Illinois Volunteer Infantry, filed her claim January 7, 1899, claiming pension on account of the services and death of her said son.

The claim was adjudicated and allowed February 2, 1900, and stated on the brief face "approved for admission; origin of death in service accepted under section 4707, as amended by act of June 27, 1890," and a fee of $10 was certified to the attorneys of record.

Said attorneys, on January 28, 1899, filed duplicate articles of agreement for a fee of $25. March 5, 1900, said attorneys appealed from your action refusing them a fee of $25 under said agreement, contending as follows:

The above entitled claim was filed by us on January 7, 1899, and upon June 28, 1899, we filed in said claim duplicate fee contracts duly signed by the claimant, wherein she agreed to the payment to us of the fee of $25, as provided by the act of July 4, 1884, upon the allowance of her claim for pension.

Subsequent to the filing of the said claim, and in anticipation of any requirements from the Commissioner of Pensions, we proceeded to the obtaining of the evidence necessary to establish the same, which evidence having been duly furnished the claim was allowed by the Commissioner of Pensions under date of February 9, 1900, and a fee of but $10 certified to us as the attorneys of record therein, the fee contracts filed by us on January 28, 1899, as above stated, and for which we hold official receipt, being entirely ignored. It is from this action that this appeal is taken, believing as we do that such action is without warrant of law, and should be reversed.

It is our understanding that in claims filed by persons claiming pension as parents of soldiers who served in the recent war with Spain it is the practice of the Pension Office to call upon such applicants to elect whether they claim pension under the old or general law, act of July 14, 1862, or under the act of June 27, 1890. If the applicant elects the act of June 27, 1890, then we understand it to be the practice to pay to the attorney of record in the claim a fee of $10, ignoring any contracts for a larger sum which may be on file.

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Upon inquiry we find that this practice is based upon the decision of the Secretary of the Interior rendered June 21, 1899, in the case of Elizabeth Darling, mother of Franklin Rickard, current decisions 244, and as construed by a further decision in the same case dated September 22, 1899.

As no information has been given to us by the Commissioner of Pensions as to why our fee contracts are ignored, we are unable to state with that definiteness which might be desired just what the grounds of that officer are for the action now appealed from. If, however, it be true that it is held by the Pension Office that the act of June 27, 1890, grants pension to a dependent parent of a soldier dying as the result of service in the recent war with Spain under any construction of law laid down by the Department in the Darling case referred to, we believe such decision to be unsound and not warranted by anything contained in the act of June 27, 1890, or in the Darling decision supra.

Section 1 of the act of June 27, 1890, provides as follows:

"That in considering the pension claims of dependent parents the fact of the soldier's death by reason of any wound, injury, casualty, or disease which, under the conditions and limitations of existing laws, would have entitled him to an invalid pension, and the fact that the soldier left no widow or minor children having been shown as required by law, it shall be necessary only to show by competent and sufficient evidence that such parent or parents are without other present means of support than their own manual labor or the contributions of others not legally bound for their support: *Provided*, That all pensions allowed to dependent parents under this act shall commence from date of the filing of the application thereunder and shall continue no longer than the existence of the dependence."

The above-quoted section contains no granting clause giving pension to a dependent parent, but is directed to changing the measure of proof which shall be required to establish the title of dependent parents to pension, the grant of pension to such parents being provided for in section 4707 Revised Statutes.

In the supplementary decision in the Darling case, or that rendered September 22, 1899, it was held that that portion of the act of June 27, 1890, which provides that "rank in the service shall not be considered in applications filed under this act" did not apply to claims of dependent parents, thus confirming the views laid down in the previous decision rendered in this case.

As it has been definitely determined that the act of June 27, 1890, contains no granting clause giving title to pension to dependent parents, but that such title rests upon the provisions of section 4707, Revised Statutes, why are the properly executed contracts for fee filed under the provisions of the act of June 4, 1884, not applicable, the claim in which they are filed being purely one filed under the general law as contradistinguished from the act of June 27, 1890.

We would therefore request that you will direct the Commissioner of Pensions to certify to us a fee of $25 as provided for in the fee contracts executed by the applicant and filed in this claim.

In your report upon said appeal you state:

Kathrina Blitch filed on January 7, 1899, a claim for pension as the dependent mother of Nicholas L. Blitch, late private, Company A, First Illinois Volunteer Infantry, who died while in the service during the late war with Spain, on September 18, 1898.

In the declaration the applicant claims pension under the provisions of the acts of Congress granting pensions to dependent relatives and alleged dependence in part upon the said soldier for support. She appointed W. W. Dudley & Co., her attorneys, and they on January 28, 1899, filed duplicate copies of articles of agreement to allow them, in case the pension was granted, a fee of $25; these articles of agreement are in due form. Calls were made for evidence as to income in 1898 and since, and

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evidence to show that the claimant was largely dependent upon her son, the deceased soldier, for support and contributions from him was filed. The claim was adjudicated and certificate issued under the provisions of section 4707, as amended by the act of June 27, 1890, it being held in effect that the claim was one under the provisions of the act of June 27, 1890. The articles of agreement were not recognized, and the fee of $10 only was allowed, in accordance with the decision in the case of Sarah O. Stockwell (Pension Decisions, vol. 10, p. 428), in which it is held that a fee in excess of $10 can not be paid in a dependent mother's or any other claim under the act of June 27, 1890. From this action the attorneys appeal. They contend that as it has been definitely determined that the act of June 27, 1890, contains no granting clause giving title to pension to dependent parents, but that such title rests upon the provisions of section 4707 of the Revised Statutes, United States, that properly executed contracts for fee filed under the provisions of the act of July 4, 1884, are applicable, the claim in which they are filed being purely one under the general law as contradistinguished from the act of June 27, 1890.

The case is similar to that of Kathryne A. Ratcliffe, certificate No. 496541, considered by the Department in a decision dated December 8, 1900. Claim was filed and prosecuted by the attorneys (W. W. Dudley & Co., appellants in the claim at present under consideration) under section 4707, Revised Statutes, United States, without regard to the act of June 27, 1890. In this decision the Department lays down the rule that an applicant for a dependent parent's pension may, if he or she so elects, make and prosecute a claim under the provisions of section 4707, Revised Statutes, United States, without regard to the provisions of section 1 of the act of June 27, 1890, and overrules so much of the decision in the case of Elizabeth Darling (10 P. D., 244 and 299), as denies the existence of such a right subsequent to the passage of the act of June 27, 1890. The Department further expresses the opinion that the claim should be regarded as having been made and prosecuted wholly under the provisions of section 4707 Revised Statutes, United States, and as unaffected by anything contained in the act of June 27, 1890, and directs that if necessary a readjudication should be made and a new certificate issued.

In accordance with this decision the appellants in the case now under consideration, have, since entering their appeal, filed an application for readjudication of the case under section 4707, Revised Statutes, United States, under which section the claim was filed and prosecuted, and for the certification of a fee of $25 under duly executed contracts filed in duplicate, less the $10 previously paid them. Shall the claim be readjudicated in accordance with the decision in the Ratcliffe case, and shall that decision be regarded as retroactive in its application and govern the Bureau in all similar cases adjudicated under the decisions in the Darling and Stockwell cases. (Supra.)

In view of the large number of cases adjudicated under these decisions and of the fact that a readjudication would result in no present benefit to the claimants, but only to the advantage of the attorneys and entail a large amount of work upon the Bureau, it is of doubtful propriety and expediency to reopen cases adjudicated under a former construction of the laws merely upon the applications of the attorneys, who would be the only beneficiaries.

If such readjudication is determined upon, shall it be upon the applications of attorneys only and not upon the applications of the claimants themselves, and without a full knowledge on their parts of all their rights and privileges as to proof required and the fees which may be allowed, and an opportunity being given them to elect under which law their applications may be adjudicated, as in cases unadjudicated at the date of your decision in the Ratcliffe case or thereafter to be filed?

I have the honor to request that you will, at your earliest convenience, fully advise and instruct me in the premises.

The appeal and papers in the case are herewith transmitted.

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In claimant's declaration for pension she alleges that—

* * * she is the mother of Nicholas L. Blitch, who enlisted under the name of Nicholas L. Blitch, in Chicago, Ill., on the 13th day of June, 1898, in Company A, First Regiment Illinois Volunteers, war with Spain. Who was taken ill with typhoid-malarial fever while on duty at Santiago, Cuba, and who died at New Haven, Conn., in consequence of the above disease on the 18th day of September, 1898, who bore at the time of death the rank of private in Company A, First Illinois Volunteers; that said son, Nicholas L. Blitch, left neither widow or child under 16 years of age surviving; that said claimant was married to the father of the said son at Cedar Falls, Iowa, on the 20th day of August, 1868, by Rev. Father Murphy; that she was partly dependent upon said son for support; that the father of said son died at Dubuque, Iowa, on the 6th day of September, A. D. 1893.

On December 1, 1899, your Bureau called upon the claimant to show whether she, or her husband, had disposed of any real estate since soldier's death, and if so a transcript from the public records showing to whom and for what consideration transfer was made. Also the testimony of credible witnesses showing the amount and source of claimant's income and her means of support in 1898 and since. On the same day a call was made for a duly verified statement of the officer having custody of the proper records, describing all taxable property borne on the rolls in the name of claimant for the years 1898 and 1899, and showing the assessed value of such property and the ratio that such property bears to the true or cash value.

It will be seen from the foregoing that this claim was filed under the provisions of section 4707, and prosecuted thereunder without regard to the provision of section 1 of the act of June 27, 1890. Claimant filed evidence showing her dependence upon said soldier for support at the date of his death and since, in accordance with the calls made by the Bureau. This brings the case clearly within that of Kathrine A. Ratcliffe, dependent mother of Stephen M. Ratcliffe, late private, Company D, First Missouri Volunteer Infantry, which will be reported in vol. 11, P. D., 171. The question arises, have the attorneys a right to their fee of $25, as stipulated in the fee agreement filed in the case?

In the case of Ratcliffe (supra) referring to the effect of section 1 of the act of June 27, 1890, upon section 4707, Revised Statutes, it was said:

Said section clearly contains no express repeal of anything in section 4707, Revised Statutes, and there can be no implied repeal unless the provisions of the two sections are repugnant, so that both can not stand and be executed together. I am unable to see that there is any repugnance. The manifest intent of the act of June 27, 1890, was not to take away any existing rights to pension, but to establish additional or alternative rights. The opening of a new and easier road to pension does not necessarily preclude applicants from taking the older and more difficult route if they conceive it to be to their advantage to do so. * * *

The actual pecuniary benefits to be obtained by proceeding under said action may be no greater than would be secured under the act of June 27, 1890; they may even be less; nevertheless the law imposes no restriction upon the applicant. If he (or she) for purely sentimental or fanciful reasons prefers to make and prosecute the

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claim under the older law, he has an undoubted right to do so. In the case of a soldier or a widow applicant this right is not questioned. Why should it be in the case of a dependent parent? It is by no means certain that the establishment of a claim under the provisions of old law rather than under those of the new may not at some time result in pecuniary benefit to the claimant. Such would be the effect, for instance, if the limitation upon the arrears act of March 3, 1879, should be repealed. But even if no substantial benefit could ever accrue, I find no authority for coercing the choice of a claimant to whom the law permits alternative courses of action.

It clearly appears from the papers in this case that the claim was filed and prosecuted, wholly, under the provisions of section 4707, Revised Statutes. You required claimant to show dependence upon her said son at the date of his death and since, but issued the certificate for pension under said section as amended by section 1 of the act of June 27, 1890. The benefits of the act of 1890 were not invoked, nor did said section 1 cut any figure in the case until the certificate was issued. Your action was, presumably, based upon the dictum contained in the Darling case (10 P. D., 244 and 299), which was overruled in the Ratcliffe case. I am of the opinion, however, that the certificate in this case was improperly issued under the act of June 27, 1890, and that the attorneys who prosecuted the claim were improperly denied the fee stipulated in the duplicate fee agreements filed prior to the final adjudication of the claim.

The Department therefore holds:

1. Where a dependent parent's claim is filed and prosecuted under section 4707, Revised Statutes, without invoking the benefits conferred by the first section of the act of June 27, 1890, and where the calls by the Bureau for evidence of dependence relate solely to claimant's condition of dependency at the date of the death of the soldier son, and continuance since, and the evidence furnished is in accordance with such calls, it is error on allowance of the claim to issue the certificate as under section 4707, Revised Statutes, as amended by section 1 of the act of June 27, 1890.

2. In such a case the attorney prosecuting the claim is entitled to such fee as may be stipulated in properly executed duplicate fee agreements filed in the claim prior to the final adjudication of the claim, not exceeding $25.

Referring to that part of your report on the appeal requesting to be informed whether the decision in the Ratcliffe case should be considered as retroactive it is only necessary to say that it is believed that said decision properly states the existing law applicable to claims by dependent parents, and whenever an application is made to readjudicate a claim heretofore erroneously adjudicated it should be readjudicated in accordance with the law as construed in the Ratcliffe case.

You will therefore please readjudicate this claim and reissue the certificate in accordance with the views herein expressed.

Action reversed.

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DISLOYALTY—CONSCRIPTION—SPECIAL EXAMINATION.

LEWIS RIDDLE.

The testimony filed by the claimant tending to show that he did not voluntarily engage in or aid or abet the late rebellion, special examination is directed in order to satisfactorily and fully determine the facts, the records of the War Department showing enlistment in the Confederate service and desertion two months, probably, later.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. February 23, 1901.

This appellant, Lewis Riddle, was a member from November 3, 1862, to August 23, 1865, of Company A, First Arkansas Cavalry, and was formerly pensioned, certificate No. 882650, under the act of June 27, 1890, but was dropped from the rolls in September, 1898, on the ground that he had voluntarily served in the Confederate army during the war of the rebellion, and he appealed October 18, 1898, admitting that he served in said army, but contending that such service was forced and constrained by the Confederate soldiers in his locality and that he deserted therefrom at the first opportunity.

The records of the War Department show that claimant enlisted for three years in Company E, Thirty-fourth (also called Second) Arkansas Infantry, Confederate States army, on August 13 (year not stated) and deserted October 20, 1862, as shown by roll from June 17 to October 31, 1862, the first on file, his name being dropped from subsequent rolls.

Claimant admits, on special examination in June, 1898, that he served in above-mentioned company in the Confederate army about two months, but was forced, he says, into such service. He testifies that for two months after the Confederate conscript law was passed he and others hid out in the mountains in Arkansas in order to escape conscription into that service, but were hunted down so vigorously by the rebel soldiers that they sent for Captain Wright, of the Confederate company above mentioned, and four of them surrendered to him and went into his company rather than be captured and placed in some other command; that as soon as they arrived near the Federal lines he deserted and immediately enlisted in the Federal Army; that he hoped to avoid any Confederate service, but "it was too warm here" and he was compelled to enter that service; that those who enlisted therein with him are dead, and he can prove that that service was not voluntary only by said Captain Wright, who now resides at Chester, Ark.

In an affidavit filed in September, 1898, under notice of contemplated withdrawal of pension, claimant stated further that he was always of Union sentiments and voted for a Union delegate to the State

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convention called to consider the question of seceding, and did everything he could to prevent secession; that the rebels were bushwhacking the country and either forcing Union men into the rebel army or killing them, and he recalled, naming them, eight who were thus killed, he says; that his father advised him to surrender until he could get an opportunity to escape, and he had already tried once to go North, but got only 30 miles away when he was forced to return, as he found he could not get North without being killed; that he still hid out and was afraid even to go to the Confederate army because of the frequent killings, and so sent for Captain Wright and surrendered to him; that while with the Confederates he had no arms of any kind and did nothing to aid them, and escaped as soon as they "fell back south and opened the way."

Andrew L. Wilson, signing by mark, states in his affidavit, filed at the same time as claimant's, that he was living a close neighbor to claimant when the war broke out and had known him well since 1857; that the question of secession was frequently discussed between them "when no secesh or rebels were present," and he knows claimant was a Union man and voted for a Union delegate to the State convention; that claimant hid out in the mountains for two months after the Confederate conscript law was passed; that he carried claimant provisions while so in hiding, and his (affiant's) house was searched for claimant twice in the night time and several times during the day, and the rebels said they were going to get them if they had to hunt every brush thicket in the country, and he names twelve who were killed, he says, while thus in hiding as Union men, and claimant's father was hung by them and robbed of all his property, he says; that claimant's father came to him (affiant) the next day where he was lying out, and he saw where the rope cut his neck; that in consequence of this extreme condition of affairs claimant was advised by his father to surrender, and did, he understands, to Captain Wright, who went out to meet him.

Celia A. Fears, also signing by mark, in an affidavit filed at the same time, states she stayed with claimant's wife nights when claimant was in hiding, and they cooked food which her father, A. L. Wilson above named, took out to claimant and others in hiding; that the rebels robbed claimant's house, taking everything he had, so that his wife could not keep house and had to go to affiant's; that so many were killed by the rebels and times became so bad that claimant finally surrendered to the Confederates and remained with them until he could safely get to the Union lines; that he told his wife, in affiant's presence, the evening before he surrendered, that he was going to get out as soon as he could.

B. E. Snead also states, in his affidavit, that he lived in claimant's neighborhood from 1847; that he knows claimant and his father and

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two brothers were all Union men and voted for Union delegates to the State convention; that one brother was killed in the Union Army and his father was hung by the Confederates to extort the place of hiding of claimant and others; that he himself was in hiding with them and food and information were brought them by Mrs. Wilson; that Confederate scouts searched his house several times for claimant, and killed a number of Union men who were in hiding; that he and claimant's father and others advised claimant to surrender and then escape when he could, and that he knows claimant did not voluntarily aid or abet the rebellion.

It has repeatedly been held by the Department that enlistment in the Confederate army is presumptive proof of a voluntary aiding and abetting of the rebellion within the meaning of section 4716 of the Revised Statutes (Milo Ousterhout, 7 P. D., 270; Augustus H. Longee, ibid, 586; William C. Couch, 8 P. D., 39; James H. Rainey, ibid. 77; Barnabas Sarver, 9 P. D., 294; John H. Kimball, 11 P. D., 124, 136).

It is also held that where it is shown such enlistment was through conscription or duress, or merely for the purpose of escaping into the Union lines, and without any purpose or intent to aid and abet the rebellion, this presumption is overcome and the case is not within the inhibition of said section 4716. See the cases above cited, particularly those of Rainey and Kimball.

In the present case it appears from claimant's allegations and evidence that he was in fact and was generally known as a Union man; that he was forced because of his known opposition to secession to leave his home, which was plundered and rendered uninhabitable, and to lie out in the mountains in hiding for two months in order to escape conscription or an alternative killing, with apparently the probabilities in favor of the latter; that in consequence of these efforts against him, particularly after at least one ineffectual attempt to get North, and with a ruthless death apparently staring him in the face so strongly that he dared not even submit to a capture by the numerous scouts who were hounding him down, he prudently, by the advice of his father, who had already suffered on his account from an attempted hanging, sent for the captain of the Confederate company, surrendered to him and enlisted in said company solely as a means, and apparently the only means, to avoid a fruitless death and escape into the Union lines at his first opportunity, as he told his wife the evening before and as was the understanding of his friends.

The records of the War Department corroborate claimant's allegations. They show he deserted from this rebel company in which he had, he says, borne no arms and given no aid to the rebellion, in two months (probably), and within two weeks thereafter enlisted in the Union Army, where he served for nearly three years, being discharged only when the war had ended and his loyal services were no longer

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required. He does not appear to have been absent from his duty during his whole Union service.

I am of the opinion that this claim should be submitted for special examination upon the question of claimant's having voluntarily engaged in, or aided, or abetted the rebellion. The adverse presumption from the fact of his enlistment in the Confederate service is strong. So, also, is the testimony filed by him in rebuttal, corroborated, as it is, by the record itself. Two of the three affiants, however, sign by mark, and the third affidavit does not appear to be in the handwriting of the affiant. The testimony of Captain Wright, who is, claimant says, the only one now living who can testify as to his enlistment in that service being forced and involuntary, has not been obtained, although apparently accessible.

The action appealed from, therefore, is reversed, and you will readjudicate the claim as indicated.

DIVISION OF PENSION—ACT MARCH 3, 1899—REPAYMENT TO PENSIONER.

HENRY N. ROTHERY.

It having been decided that upon a proper construction of the law and upon the evidence in the case the division of the pension and the payment to the wife of this pensioner, by virtue of the act named, were erroneous and without proper warrant of law, the refusal to restore to him the amount of which he was deprived is likewise illegal, and it is directed that such amount shall be paid to him.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 23, 1901.

Henry N. Rothery, late of Company D, Fifth United States Artillery, who is a pensioner at $30 per month, on account of injury of left temple and disease of liver and stomach, has entered an appeal, February 7, 1901, from your refusal to refund or pay to him the sum of $270, the same being one-half of his pension for the eighteen months ending October 8, 1900, and which had been deducted and paid to his wife under the provisions of the act of March 3, 1899, but which deduction and payment have been held by departmental decision of September 5, 1900, to be erroneous.

The decision referred to contains quite a full statement of the evidence bearing on the issue involved, and two points were therein fully discussed and determined. The first of these was the scope of the act of March 3, 1899, which was held to have only a prospective operation, that it is not retroactive, either as to the period during which the desertion on the part of the pensioner shall be shown or the date from which the division of his pension shall commence. So that when, as in this case, a claim was filed less than six months after the passage of

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the act, the same was premature and no right then existed to a division of the pension.

The other point decided was that the evidence on file was not sufficient to show that there had been actual desertion of his wife on the part of the pensioner, and the case was not brought within the purview of the act in relation to its merits any more than upon the legal aspect before mentioned. It was directed, therefore, that the pension of which the pensioner had been deprived should be restored to him.

When, however, he made application for the amount which had been withheld and paid to his wife, the pensioner was informed that while the payments to the wife as a participant in the pension had been stopped, and he had been restored to the full enjoyment of said pension, yet the amount already paid to the wife could not be paid again to him. This information was conveyed in the following language, as shown by a copy of a letter on file in the case:

> There does not appear to be any authority of law for paying to you $270 or otherwise complying with your request for payment to you of the amount deducted from your pension and paid to your legal wife under authority vested in the Commissioner of Pensions by the act of March 3, 1899. Your demand is therefore denied.

No further explanation of the refusal to pay this money appears. No reference is made to any law which was considered prohibitory of such payment, and no reason is given for the compliance with one part of departmental decision and the failure to comply with another, or the direction given therein further than is contained in the statement that there is "no authority of law" for making the payment. It is not supposed there was any disposition to ignore or defy that direction, and yet it is not clear upon what basis it is held there is no authority of law for it. It can be only presumed, therefore, that the division of the pension in the first instance is regarded as having been made under a construction of the act of March 3, 1899, which obtained at the time of such division, and this pension having been once paid could not be paid again, although the construction of the law may have been changed.

In other words, it is probably meant that whatever has been done upon a mere judgment or construction of the law can not be undone when such construction is different. This position has some support in the well-established rule of practice founded upon the learned opinion of the Assistant Attorney-General of December 3, 1889 (6 P. D., 297), upon the law and practice of reimbursement, and if the matter rested alone upon a construction of the law which was afterwards declared erroneous, but which contained no element of mistake of fact or serious injustice to the pensioner, the position might be tenable.

But there is much more involved in this case than a simple erroneous construction of the act. The pensioner has been deprived of one-half of his pension not only upon a mistaken judgment of what the law authorizes, but upon a mistake of fact as well, for there is no such con-

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dition established by the evidence as would bring the case within the contemplation of the act, even if the construction first given were allowed to prevail. As declared in the former decision, it is not shown that pensioner had actually deserted his wife. On the contrary, his failure to live with her for ten years or more has been plainly because of her refusal to permit it. So that the action in the premises by which the pension was divided and one-half given to the wife was without authority of law or fact.

On the point of the authority to pay money again which had been already paid under color of law it may be stated that much depends upon the facts in each case, and when, as in the present instance, a palpable mistake has been made in diverting the pension money to the use of another than the pensioner he can not be held liable for the mistake or deprived of what is his just due under his certificate. The pension laws are very jealous of the rights of pensioners and seek in every way to secure to them the pensions granted and safeguard the same from being taken away upon any pretext other than by direct authority of law. This is shown by such provisions as sections 4734, 4747, and 4766, Revised Statutes.

So, also, it will be found by reference to the opinion of the Assistant Attorney-General, before noted, that various cases are cited wherein the right to take away the pension or part of the pension of a pensioner is denied, even though the Government has sustained a loss by some wrongful or mistaken act of its agents. In this case it was by no fault of the pensioner that he was deprived of one-half his pension for eighteen months, and since that action can not be sustained by a proper construction of the law or the facts in the case there is no authority of law for keeping him out of the pension money thus withheld and paid to the wife. It is, therefore, clear that the pensioner may not be legally denied this sum of $270, and the refusal to pay it to him was erroneous. It is again directed, therefore, that the same be restored to him.

JURISDICTION—DECLARATION—FILING AFTER DEATH.

ASA H. DILLEY.

Soldier executed his declaration and mailed it to the Commissioner of Pensions, but died six days prior to the date of its receipt at the Pension Bureau.

Held, a pension claim is not pending until the date of the filing of the declaration, for the Commissioner of Pensions attains no jurisdiction until the declaration is filed. The Commissioner of Pensions could have no jurisdiction over a dead person, and the filing of said declaration was of no force or effect.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 27, 1901.

A declaration signed and executed by Asa H. Dilley, formerly a sergeant in Company D, Twenty-sixth Ohio Volunteer Infantry, was filed

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with the Commissioner of Pensions on May 5, 1879. The claim was rejected on January 25, 1898, on the ground that there was no claim pending at soldier's death. An appeal was filed on October 26, 1898, which, while somewhat ambiguous, is evidently intended to raise an issue of law as to the right of the widow to complete the claim.

The declaration in question was executed on April 10, 1879, in Nevada County, Cal., soldier died nineteen days thereafter, and the document was, as stated, filed on May 5, 1879, six days after the death of soldier. Such facts are the only ones necessary to be set forth in order to understand the issue raised by the appeal, which is: Has the declaration any force as a claim filed by the soldier, and what are the widow's rights thereunder?

No claim of any nature has any legal force against the Government until certain procedure has been taken. There may be, long before such procedure is taken, the elements of a claim, but they are of no practical effect, and can avail nothing to a claimant, or complainant, until they are not only formulated but presented to the Government; and Congress has designated the Commissioner of Pensions as the party with whom a declaration for pension must be filed. The formulating of the claim, the execution of the necessary papers, and the forwarding of the same to the proper person are all necessary steps to be taken in order to perfect the claim; but the papers do not, strictly, constitute a claim until they are deposited with the proper party. That is, the claim has no legal effect until it is filed.

Such a truth is as old as the courts themselves, and is, virtually, axiomatic; for, as the court is the body which must decide the issue, how can it be cognizant of the claim until it is brought to the court's attention? The declaration is not the claim, in the sense in which the word claim is being discussed; it is but evidence of the intention to assert a claim, and it represents but such an intention until the demand is made; and in a pension claim, as in practically all other claims, the demand is made and the right asserted by the act of filing the declaration. No claim has any standing in any court until a legal assertion of the right is made out in proper form, and a demand made; in fact, no legal assertion of a right is actually made until the demand is made, for the demand is in reality the assertion of the right; and, as just stated, the demand is made by the act of filing the declaration.

It can not be successfully contended that the demand was made, the right asserted, in this case, when the papers were deposited in the post-office, which date was doubtless prior to soldier's death. Contractual rights often spring into existence upon the mailing of certain papers, but this is because of the fact that a party to the contract binds the contract in the papers which he mails. In other words, that the act of such party was the only further necessary step to make the contract binding; that he took such a step in the papers which he

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mailed, and by such mailing delivered the contract. There is no such element, however, in a pension claim, and the Government is not legally aware, in a pension claim, that a party claims anything from the Government until the proper paper or papers are filed with the Commissioner of Pensions.

It is evident, without discussion, that no right can be asserted against the Government by a dead person; for, as is evident in the case at bar, the dead person is physically incompetent to file a claim. He has no being; he has ceased to exist. A declaration may be filed by the proper party, asserting a right to something, which right passes by or through a deceased individual, and to which the living person is entitled in lieu of such deceased person; or, if a declaration has been filed by a person during his lifetime, and the claim thereunder is pending at the death of such person, then the legal party in interest may generally, by proper substitution, complete such claim. But if the declaration has never been filed, if the action has never been commenced, it can not be completed by the party in interest, for there is nothing to complete; and the action can not be commenced in the name of the dead person, after his decease, for such dead person has no existing right. It is only the right which has been asserted, and which exists after death, that can be prosecuted, which said right may be then prosecuted upon the showing that the right was a continuous one and which passed to some other party upon the death of the original claimant, after the filing of the claim.

The court, or officer of the Government, who has such matters in charge, must have jurisdiction over the claimant when the demand is filed; otherwise it or he has no power to entertain the demand. In the case of a declaration for pension filed after the claimant is dead, the Commissioner of Pensions could have no jurisdiction over such deceased person, and he consequently could not entertain the claim.

There is, moreover, a reason more cogent, perhaps, than those heretofore set out, which would effectually settle the question as to the right of a widow to complete a claim executed by a soldier, but filed after his death. It is a well-settled principle of common law that all personal rights cease with the death of the party to whom such rights attach, and that they can not be revived. Statutory enactment granting the right to revive is an absolute necessity. In the absence of a statute the widow could have no right whatever to complete a claim pending at the soldier's death, for a soldier's claim for a pension is purely a personal right. The statute, however, grants the widow the right to complete a "pending" claim (such right being embraced in section 4718, R. S.), but none other than a "pending" one. It has already been demonstrated that there was no claim pending at the date of soldier's death, and the soldier's claim, or personal right, which is the same thing in this case, died with him.

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It being necessary that such a declaration as the one at bar should be filed during the lifetime of a soldier, and it being admitted that the soldier died before his declaration was filed, it is evident, without further discussion, that the Commissioner of Pensions had no jurisdiction in the matter, and that the claim died with the soldier. A pension claim is not pending until the declaration thereunder has been filed. See opinion in case of widow of Talbot Dale (8 P. D., O. S. 152, Secretary Kirkwood).

Action affirmed.

DESERTED WIFE, ACT MARCH 3, 1899.

MARY C. SLAGLE (WIDOW).

It appearing from soldier's own testimony that he deserted his wife and that she was a woman of good moral character; and it further appearing that said wife is in necessitous circumstances, the action of the Bureau of Pensions in paying to said wife one-half of the pension he was drawing was proper and is affirmed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. February 28, 1901.

Henry Slagle, formerly of Company E, Thirty-sixth Iowa Infantry, is pensioned under the general law at the rate of $17 per month. This rate he has received since July 17, 1893.

On December 18, 1899, his wife, Mary C. Slagle, filed a declaration under the provisions of the act of March 3, 1899, alleging that her said husband, on the 27th day of February, 1899, while residing at Bloomfield, Davis County, State of Iowa, deserted her and had since remained away from her without any cause; that said husband is a resident of Ottumwa, Wapello County, Iowa; that she is a woman of good moral character and in necessitous circumstances. Her claim was allowed on January 8,1901, which would, under the provisions of said act, require the Commissioner of Pensions to cause one-half of the pension—

due or to become due said pensioner during the continuance of such desertion, to be paid to the wife.

Being dissatisfied with said action, the pensioner appealed on January 28, 1901, resting upon the contention that the same was contrary to law and the facts established by the evidence. The error of law assigned is embodied in the contention that the alleged desertion, if any, was committed prior to the passage of the act of March 3, 1899, which can not be legally made to have a retroactive effect or operation.

The relevant provision of said act as it relates to the legal contention above mentioned is as follows:

That in case a resident pensioner of the United States shall for a period of over six months desert his lawful wife, she being a woman of good moral character and in necessitous circumstances, etc.

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This contention, it will be seen, rests upon the legal proposition that a desertion alleged to have been consummated prior to the passage of the act can not be made the basis of such a claim, no matter how long the desertion may continue to exist subsequent to the passage thereof. It will be observed that the claimant waited until more than six months had elapsed after the passage of the act before filing the claim now under consideration. Said act does not provide for payment of half of the pension to the wife from the date of desertion, but the provision is that—

> The Commissioner of Pensions is hereby directed, upon being satisfied by competent evidence of such desertion, to cause one-half of the pension due or to become due said pensioner during the continuance of such desertion to be paid to the wife, etc.

The first duty of the Commissioner of Pensions is to ascertain whether the declaration was filed more than six months after the passage of the act of March 3, 1899, and then it becomes pertinent and material to inquire whether the husband has been in a continuous state of desertion for more than six months after the passage of the act up to the date of the filing of the wife's claim. It is quite immaterial whether the first act of desertion was committed prior to or subsequent to the passage of the act. If the soldier deserted his wife in February, 1899, and has since been in a continuous state of desertion up to the date of filing the claim, then each intervening day's absence and failure to provide for her has been, in legal contemplation, a separate and specific act of desertion. Desertion is something which is continuous in its nature, and may be dated from any point of time embraced in the whole period of its duration. The claimant in this case, therefore, might with perfect legal propriety have alleged that her husband deserted her on March 4, 1899, or at any other time subsequent to the passage of the act in question. The legal contention, therefore, that the act has been so construed as to give it a retrospective operation is untenable.

The next contention set forth in the appeal is as follows:

> It is further shown by the evidence that as a matter of fact no desertion can be charged in this case, but the evidence shows that the claimant is a woman of ungovernable bad temper, continually abusing the soldier, running him in debt to supply her grown-up children by a former marriage, so he was obliged to sell his farm to settle up his indebtedness caused by her extravagance, and when the deed was to be signed refused to do so unless he paid her $1,000, claiming that as her dower share, which amount he paid her, and also gave her all the furniture, which settlement satisfied her, and she asked him to go to Centerville, Iowa, and buy a house or build one on the lots she owned there, which he refused to do, and claimant then left him for Centerville, Iowa, while soldier went to Wapello County, Iowa (Ottumwa), to live with his daughter. That surely can not be called desertion on his part.
>
> He complied with the verbal agreement made by both to give her $1,000, and of the money received by the sale of the farm, all the household furniture, as well as a cow, and I claim that his was an abandonment of her husband on her part and relinquishment to any fu.ther demands for support.

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The evidence of the two parties interested as taken on special examination does not warrant the statements above recited. In the first place, the soldier admits that he deserted his wife at the time and place alleged by her, nor is it contended that the gift of $1,000 to her was made in contemplation of a separation by mutual consent, but he admits that she contemplated buying a home in her own name for their mutual benefit. From the view point of the soldier the material facts in the case are thus stated in his testimony before the special examiner:

Q. You may give in detail the circumstances under which your separation took place.—A. Well, I don't know that I have much to say about that; I couldn't stand her ill treatment, the first thing, and extravagance; and she left me alone a good deal. Once she was gone three weeks to Fort Scott, Kans. I can't give you the date of that. I can't give anything like the exact date. She went there to visit her son. After that her son got in trouble and all came on to us to live. I can't give you the length of time they were at my house. Pary C. Truax came first. I can not give you the date. He and his wife came about May, 1896, and he remained about two years. I was then living on the farm. Oh, yes; he worked a little. I let him have a team and he huckstered through the country most of the time—gathered up eggs and chickens. No; I did not make any particular objection while he was there. I thought it might be a good thing to help the boys a little. Sometimes he would bring home something—sugar, coffee, and things used about the house—but not near enough to pay for his board and the use of the team.

Q. Could you not have relieved yourself of the presence of those persons by notifying them to leave your premises?—A. I might have done so; but I did not think that would have been a very charitable thing to do, as my wife was their mother.

Q. Did you provide a home for any of your own children?—A. Not until after that. At the time of my marriage to claimant I had one daughter who lived with us a couple of years.

Q. Give the circumstances of your separation. Did you leave claimant?—A. Yes; I suppose I left her. She was at home when I left. I will give you a little history. Things went on. I was getting behind and I had to sell the farm—in March, 1899. I received $2,700 for it. An attorney was there to sign the deed. When the deed was handed to my wife to sign she said she would not sign it unless I gave her $1,000 to buy a house in her own name. After studying a while I consented to that. The attorney was Mr. Payne, of Bloomfield, Iowa. Yes, sir; Mrs. Slagle said she would not sign the deed until I gave her the $1,000. No; she did not demand any writing or guaranty. After I had made the promise to give her the $1,000 I suppose she just took my word for it. She had borrowed $200 from her brother-in-law, John Ricksher, of Fairfield, Iowa, to carry on a suit against the railroad company for a son she had killed, and I had signed the note with her, and I told her I would give her the $1,000 if she would pay that note out of it, and I understand she has paid it. Yes, sir; she said she wanted the $1,000 to buy a house in her name. I couldn't tell you whether it was her idea that the house should be a home for both of us or not. I think likely it was.

Q. At the time you paid her this $1,000, was anything said about a separation?—A. No, sir.

Q. Was the matter of a separation brought up or discussed at any time before you left your wife for good?—A. Not in particular; but I told her a number of times that I would leave her if she did not treat me with more respect.

Q. Do you make any charges against the character or good name of Mrs. Mary P. Slagle?—A. No, sir; I have never doubted her virtue or anything of that kind.

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Q. Did she, as your wife, make purchases of any articles not necessary for the comfort or convenience of your home?—A. I thought she did, but I can not state what it was. I kept no account. I can't tell you the amount. She purchased a sack of flour at William Lochren's, in Drakeville, and sent it to her daughter-in-law, Emma Truax. I can not name any other specific instance, but our bills ran up fast. We traded at Buntine's, at Drakeville, Iowa, and I refer you to his books to sustain my statements.

Q. Did you give your wife permission to use your credit at the stores?—A. Yes.

Q. Did you ever withdraw that permission?—A. No; I think not.

Q. Did you make any attempt to regulate the expenses of your home?—A. No; I believe I just let my wife go and get what she wanted—that was my rule—and I paid the bills. No, sir; I can not tell what the total of my household expenses were for any one year.

Q. Did Mrs. Slagle ever offer you any personal injury?—A. The only violence she ever used was shortly before we parted. She jumped me for a fight one night and struck me in the eye and made sparks fly. She accused me of something I was not guilty of, and I told her she was not telling the truth. No one was present. A girl working for us, named Love Beedle, was in the kitchen. Just before I left Mrs. Slagle she had gone to Centerville; don't know whether she took her money or not, but while she was gone I took my money and came over here to Ottumwa, and gave it to my children. I gave my money to my children, and they bought a place which I now live in.

Q. Did you discuss with Mrs. Slagle the matter of purchasing a home in Centerville, Iowa?—A. I don't know just what was said about that. I never made much inquiry about that; I supposed she intended to look about some. No, sir; I never told her anything about my intention to move to Ottumwa, Iowa.

Q. Had Mrs. Slagle ever refused to go to any home you might provide for her?—A. I think not.

Q. Have you at any time offered her a home with you here in Ottumwa, Iowa?—A. No, sir.

Q. What, if any, property or money had your wife when you married her?—A. She had $1,000 on interest and some more money owing to her from a son.

Q. What was done with this money?—A. I couldn't tell you; went mostly to her children, I think. She bought some things for herself out of that money, but not much. I think her children got away with most of it.

Q. Have you ever applied for or obtained a divorce from Mrs. Mary C. Slagle?—A. No, sir.

Q. Do you still consider her your legal wife?—A. I don't believe I do. In my own mind she is not my legal wife, but I have nothing to show that she is not.

Q. Upon what grounds do you say that, in your mind, she is not your legal wife?—A. I don't think she used me as a wife should a husband. The language she used, and accused me of things I was not guilty of.

Q. Do you stand ready at this time to provide a home and support for Mrs. Slagle?—A. No, sir. One thing I want to state. I did not leave her destitute. I gave her all the furniture; but most of the good furniture was her own; and I gave her a cow. No, sir; this cow was not afflicted with disease.

By CLAIMANT:

Q. Did I ever go away from home, Pa, without your consent and on a visit?—A. No; I don't think you did.

Q. The time I went to Fort Scott, Kans., his daughter, Ella Slagle, and his granddaughter were home to take care of him.

By S. E. ADLER, ATTORNEY FOR SLAGLE:

Q. Mr. Slagle, you suffer with severe attacks of rheumatism and heart disease, do you not?—A. Yes.

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Q. Does any abuse or excitement bring on attacks?—A. Oh, I don't know but what it does.

Q. Is it for that reason you left your wife?—A. Yes, sir; that is part of the reason; the others I have already related.

Q. Now state fully how your wife treated you for the year before you left her—use the language she used; and if it was abuse, give that.—A. I don't know that I can give the language she used. After her children came there she was crosser to me than she had ever been before, and would abuse me for anything I did that didn't just suit her.

Q. Did she ever call you names?—A. No.

Q. Did she ever swear at you?—A. No; I never heard her swear an oath that I know of.

Q. What other grandchildren were you compelled to support other than those already stated?—A. The wife and two children of her son, Frank Truax, were at my house three or four months in 1896, I guess.

By the EXAMINER:

Q. Did you object [to] their being there?—A. No; I said nothing against it. I didn't like so many people around, but I treated them with respect, like I do everyone else.

Q. If you had objected and made demand on Truax to have removed his wife and children would he have done so?—A. I couldn't say, because he had no place to go and no money.

By S. E. ADLER:

Q. Have you any reason for not applying for a divorce?—A. My wife says I need never ask for a divorce, for she wouldn't give me one. I have heard the above and it is correct.

Q. Did you tell your wife to go to Centerville and look up a house, and that you would buy it?—A. No, sir; I told her she might go up to Centerville and see what she could do, but I had made up my mind not to go to Centerville, Iowa.

Q. Did you buy a house in Ottumwa, Iowa, at any time?—A. No, sir; I gave the money to my children and they bought the house. I gave my children $1,000, and it took the greater part of my balance to buy furniture.

By the EXAMINER:

Q. In your sworn statement, B. J. 20, you claim that you did not desert your wife. What do you have to say as to that?—A. I did not know that was there. It is my view that I left my wife.

Q. Did Mrs. Slagle present you a watch?—A. Yes; the watch cost $36 in New York. She gave me that some little time after our marriage.

There is no witness in the case who testifies that claimant ever at any time offered to do personal violence to the soldier, and she positively denies that she ever struck him. Besides, the testimony all tends to show that claimant was a neat and tidy housekeeper, and always provided a good table, and took proper care of her husband's clothing. It is also admitted, and by nobody controverted, that she is a woman of good moral character, and is in "necessitous circumstances." The money which her husband gave her has been expended in the payment of debts, and in defraying the expenses of a fruitless lawsuit against a railroad company for causing the death of one of her sons. The claimant also states, and it is not denied, that she had

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$1,400 out at interest when she married the soldier, the principal and interest of which were used in common for household necessities.

She also contends that the $1,000 which her husband gave her was bestowed voluntarily and without any demand on her part, and that she kept none of his household goods when he left her; that the furniture was her own. It is also abundantly shown that she earnestly protested against the separation, and has never since consented to it either by word or deed.

It is also contended that the act of March 3, 1899, is in conflict with the "general pension laws," which provide that pension money shall inure to the benefit of the pensioner only, and is unconstitutional in that it deprives one of his property without trial by jury.

This contention presents the issue that a pension granted in conformity to existing legal provisions is a vested right which can not be divested by subsequent legislation. In this connection it is proper to note the fact that the soldier's military service began in the month of August, 1862, and terminated in the month of August, 1864. The act under which he is now in receipt of $17 per month was passed on March 3, 1873, and is now section 4699, Revised Statutes. The Bureau of Pensions has also recently determined that he will be allowed a rate of $24 per month from November 2, 1898, under the provisions of the act of March 3, 1883.

It can not, therefore, be contended that the laws under which he is now pensioned were in existence at the time of his enlistment and consequently entered into his contract obligation with the Government. It is through the beneficence of Congress that the soldier receives his present rating, independent of any contract obligation on the part of the Government. The right of the law-making power to modify existing pension laws of that character by subsequent legislation has never been questioned by the Department. In the case of Jackson Martin (7 P. D., 265) it is held that: "No pensioner has a vested right to his pension." This principle is reaffirmed in the case of Edwin Earl (10 P. D., 176). The objection to the statute in question based upon the contention that it deprives one of his property without trial by jury is untenable, for the reason that there is no such constitutional provision. Under the Constitution no one can "be deprived of life, liberty, or property, without due process of law." In this case the "due process of law" prescribed by statute has been fully complied with. To deprive one of life or liberty on account of a criminal offense involves a trial by jury as a constitutional right, but in civil procedure property rights are often determined without such intervention. The contention, therefore, that the act of March 3, 1899, is unconstitutional is untenable, as there is no question of such a nature involved.

Action affirmed.

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MARRIAGE AND DIVORCE—IMPEDIMENT.

MINERVA BROWN (WIDOW).

It being shown that at the time of this claimant's formal marriage in 1876 to the soldier herein she had a former husband living and undivorced, such marriage was invalid and void; but as she and soldier then married in entire good faith, believing in her legal competency to marry, and cohabited thereafter continuously for twenty-one years, eleven of which were subsequent to the death of her former husband, each continuing until the soldier's death in the belief of their legal union, holding themselves out as man and wife, and being generally accepted as such, it is held that there was, under the laws of the State of Mississippi, where she and soldier resided at the time of his death, a lawful and valid marriage between them subsequent to the death of said former husband, and that she is, therefore, the soldier's lawful widow.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 28, 1901.

This appellant, Minerva Brown, on November 8, 1897, filed a claim, No. 665209, for pension under the act of June 27, 1890, as widow of George Brown, who was a member from January 5, 1865, to January 5, 1866, of Company B, Forty-seventh United States Colored Infantry, and died October 22, 1897.

Said claim was rejected in December, 1900, on the ground that the claimant is not the legal widow of said soldier—

* * * because at the date of her marriage to him in 1876 she had a husband, Peter Sanders, living, and who did not die until 1886.

On January 15, 1901, she appealed through her attorney, who contends that a divorce of claimant from said Sanders prior to her marriage to this soldier should be presumed, and that such marriage should, accordingly, be held valid, and she the legal widow of the soldier.

In view of her present necessitous circumstances, her appeal is given immediate consideration.

The material facts in this case appear to be undisputed. Claimant admits her former marriage, in 1866, to said Sanders, with whom she lived in Vicksburg, Miss., until about 1872, when he left her, going to Rolling Forks, Miss., in a contiguous county, where he resided until killed in a fight in 1886. She never procured any divorce from him, and never heard of any being procured by him. On being told, however, that she could legally remarry without any divorce after three years desertion by her husband, she married this soldier Brown by ceremony in 1876, a transcript of the record of which marriage is on file herein. Brown had known said Sanders and was fully acquainted, she says, with the facts of Sanders's and claimant's marriage, of Sanders's desertion of claimant, and that there was no divorce from this marriage of Sanders and claimant. Sanders afterwards told Brown, she says, that he was glad she had married a man who would

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treat her better than he had. Sanders was said, claimant testifies, to have "had another woman" after he went to Rolling Forks, but she never heard the name of this other woman or whether she and Sanders were married.

Upon these admitted facts the claimant contends that a divorce from her marriage to Sanders prior to that to Brown should be presumed.

I am of the opinion, however, that such presumption can not arise in this case, as the facts admitted preclude any such, and tend rather to show positively that there was no divorce. Claimant admits she never procured any, and Sanders is shown to have lived either in her own county or in the adjoining county continuously after their separation until his death. The courts in these two counties only, therefore, had legal jurisdiction to grant any divorce in this case, and if any were obtained herein it must have been obtained in one or the other county; and if it were obtained in either, it is most improbable that claimant would be or would remain ignorant of the fact. Both she and said Brown were in position to know of any divorce; the question was, she says, discussed between them, and both knew there was no divorce. They married solely upon the strength of their information that their marriage was valid because Sanders had been absent in desertion for three years.

I am not aware of any law in the State of Mississippi authorizing marriage under such circumstances, and none is cited by claimant. On the contrary, it is the universal rule that a second marriage while the first husband or wife is living and undivorced is invalid and absolutely void, and that the desertion for any length of time of the first husband or wife does not, of itself, confer upon the deserted party any competency to remarry, although it may be ground for such party procuring a divorce, or may, in connection with other facts, in order to sustain a subsequent marriage, entered into in good faith by such party, afford a basis for presuming the death of the deserter, or divorce, if he or she be shown to be living prior to such remarriage.

Presumptions, however, give way to facts, and when it is shown, as in this case, that no divorce was, in fact, obtained in the only jurisdiction within which it might legally be secured, no presumption of a divorce can arise.

This claimant's formal marriage to Brown in 1876, therefore, was void; and she can have no pensionable rights by reason of such marriage.

It appears further, however, that she and Brown cohabited, ostensibly and apparently with a mutual matrimonial intent, as husband and wife from the death of Sanders in 1886 until Brown's death eleven years later, and the question arises whether a new marriage contract may be presumed to have been entered into between her and Brown subsequent to Sanders's death.

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In the State of Mississippi, as in most of the States, a contract of marriage made per verba de præsenti, merely, without either civil or religious solemnization, but followed by cohabitation, constitutes a valid marriage, which is provable by acts and declarations. The supreme court of that State, in the case of Floyd *v.* Calvert (53 Miss., 37), state this is "definitely settled" by the repeated adjudications of that court, and in the case of Dickerson *v.* Brown (49 Miss., 373), they say "the right of parties in this State to contract marriage without formal or ceremonial celebration is understood to be settled beyond question."

The court further say, in the latter case, that,—

* * * the doctrine seems to be that, though ignoring the directions of the statute, and though disregarding all forms and ceremonies, the law should make persons married who intend marriage, and this the constitution of our State has adopted as the organic law. All others, outside the class named, are in illicit, meretricious or criminal cohabitation.

The court here refer to the article of the constitution of the State of Mississippi, adopted in 1869, which provides that those who were then cohabiting as husband and wife, yet without being legally married, should thereafter be considered as lawfully married and their children as legitimate. These provisions, the court say, distinguish between those who "were in good faith observing toward each other the relation of husband and wife, or with a desire to assume to each other, honestly, that relation," and "those living in adultery and concubinage," and operated to legalize the former in cases where, prior to the adoption of said constitution, the relation was thus, in the intent and purpose of the parties, truly and essentially matrimonial, but invalid as a marriage because of some impediment, particularly an impediment affecting the competency of one or the other of the parties thereto, such as the institution of slavery, or a statute prohibiting intermarriage between races or between persons who are within certain degrees of relationship.

The point made is, in brief, that where a man and a woman are shown to have, with a bona fide matrimonial intent and purpose, cohabited, one or the other, however, being in law incompetent to marry, the continuance of such cohabitation after removal of the cause of such incompetency is referable to the original matrimonial intent, and a lawful marriage may be presumed from the fact of such cohabitation and continuance thereof, because, as stated in Dickerson *v.* Brown, supra, "the law should make persons married who intend marriage."

And even where the original cohabitation existing at the date of the adoption of said State constitution was in "confessed adultery," because of an impediment to marriage which was swept away by such constitution, "the continued cohabitation after adoption," the court in Floyd *v.* Calvert, supra, say, "might of itself be a strong circum-

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stance to show the acceptance of its provisions and the desire to assume toward each other a new and lawful relationship," while no such force or weight could be given, the court continue, to continued cohabitation after adoption of the constitution between a man and a woman as to whom no lawful obstruction to matrimony had ever existed, but who had, notwithstanding the way was thus open to a legal marriage between them, voluntarily chosen to cohabit without any marriage. In the latter case the court say:

* * * There must be shown some formal and explicit agreement between the parties; * * * or there must be such open and visible change in the conduct and declarations of the parties that an agreement to accept the new law might fairly be inferred.

Marriage in such case can not, they say, be made out under said constitution "by any proof short of that which would establish it in the absence of the provision;" and "evidence that would meet the requirement of either branch of this proposition would doubtless be sufficient," they add, "to establish a new marriage under the laws of this State without regard to the constitutional provision."

The distinction here made by the supreme court of Mississippi was in cases arising under the special provision of the constitution of that State above referred to, but, as seen, the court was strongly and decidedly inclined toward holding that the same distinction, with the same force, would exist under the laws of that State irrespective of the State constitution.

Many other States have, in fact, also recognized this distinction generally, at least have held that cohabitation continued for years after removal of an impediment which prevented a legal or valid marriage prior thereto will be sufficient from which to presume a marriage after the removal of such impediment, the prior cohabitation being bona fide in character and not meretricious. Some States require that a new actual marriage be proved; but, as seen from the language of the court above quoted, in the State of Mississippi such proof would be there required only when the prior cohabitation was "intentionally" impure, was "illicit, meretricious, or criminal," as stated in the case of Dickerson *v.* Brown; and when such prior cohabitation was, in the minds and hearts of the parties, a pure and matrimonial, although not a legal or valid union, such strict proof should not be required, but the subsequent cohabitation would be referred, as to its legal or illegal, matrimonial or nonmatrimonial character, to the original matrimonial intent of the parties, and the three requisites of marriage, competency, consent, and cohabitation, coexisting, marriage would be held to be established.

Although a marriage so established is generally spoken of as "presumed," it is, in fact, one proved and not presumed.

In the case of Stevenson's Heirs *v.* McReary (20 Miss., 56), an in-

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struction to a jury that if they should find from the evidence that the parties cohabited and held themselves out as man and wife, raised children, and acknowledged such children as theirs, they must find a marriage, was held to be erroneous and "too strong," because "it left no room for the jury to determine on the weight of evidence," the question being one, the court say, which should be left to the jury to say from all the evidence pro and con whether there was in fact a marriage.

It would, doubtless, be proper for the court also to instruct the jury in such a case that marriage is an institution which is favored in law, in support of which every reasonable presumption is to be indulged, and when presumptions conflict those in support of the marriage are to control; also, that a presumption which would result in a criminal holding should not prevail.

As to the latter, the supreme court of Mississippi, in the case of Spears *v.* Burton (31 Miss., 555), held that the presumption in favor of marriage should prevail over that in favor of life, and that death of a prior husband or wife would be presumed in order to sustain a second marriage, although such husband or wife was known to have been living within five years of the second marriage, "because, otherwise, the second marriage would be held criminal by reason of a presumption," and that such marriage would be held invalid only on proof that the former husband or wife was then, or but shortly before, living.

In a case like the present, if it be presumed, because of the original illegal character of the cohabitation prior to removal of the impediment, that the cohabitation subsequently was alike illegal, it would result in the holding, merely on presumption, that such subsequent cohabitation was criminal.

This is, in itself, obnoxious to legal principles; and when it is shown that the cohabitation was begun, as in this case, in entire good faith, both parties intending a present lawful marriage and believing that they were then capable of and were, in fact, so contracting, and was continued thereafter for twenty-one years, and for eleven years after removal of the only impediment to their legal union, it would seem clear, in principle and on authority, that marriage, subsequent to removal of the impediment, should be held to have existed, and especially should such holding be made when one of the parties to such marriage has died.

The law favors marriage, and when once solemnized according to the forms of law, will not declare its nullity upon anything less than clear and certain testimony, especially after it has been dissolved by the death of one of the parties. (Powell *v.* Powell, 27 Miss., 785.)

In this case, the claimant and Brown were married in due legal form. Although she was then, in law, incompetent to marry, both she and he believed in her competency, and according to her testimony such

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belief was based upon legal advice; and both then fully intended marriage, and fully believed they were lawfully married; both continued, apparently, in this honest belief during their joint lives; and their entire cohabitation of twenty-one years was, to all intents and purposes, for them a truly matrimonial one, and which both they and the community respected as such.

I am, therefore, of the opinion that claimant should be held to be the soldier's widow, and your action is, therefore, reversed, with direction that the claim be readjudicated accordingly.

MARRIAGE—DIVORCE—JURISDICTION—DECREE OF VALIDITY.

MARY J. VOGLER (WIDOW).

The appellant was married to the deceased soldier in Hamilton County, Ind., in 1880, and lived with him as his wife until his death in 1896. She was previously married in 1869, to one Henry Curtner in Ohio. In 1898 she obtained a decree in the circuit court of Hamilton County, Ind., annulling and vacating her marriage to Curtner on the ground of his insanity, and declaring her marriage to the soldier valid, legal, and binding under the laws of Indiana.

Held: That said court having had complete jurisdiction of the subject-matter and the parties, its judgment and decree declaring said marriage to the soldier legal and valid under the laws of Indiana is binding and conclusive, and establishes the legal status of the appellant in that State as the lawful wife of the soldier, and she should be accepted as his widow for pensionable purposes in accordance with the provisions of the second section of the act of August 7, 1882.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 8, 1901.

Andrew Vogler, late a private in Company H, Eighteenth Indiana Volunteer Infantry, was a pensioner under the provisions of the general pension law at the rate of $12 per month for chronic diarrhea and piles, when, on June 6, 1892, he filed in the Pension Bureau an application for increase of said pension, based on the accepted disabling causes, and also for additional pension, based on rheumatism and resulting disease of heart and paralysis; and scurvy and resulting disease of mouth, alleged to have been contracted in line of duty during his military service. Said pensioner died on April 26, 1896, prior to the final adjudication and determination of said application for increase and additional pension, and Mary J. Vogler was permitted to continue the prosecution of the same as his surviving widow.

On May 1, 1896, said Mary J. Vogler filed in the Pension Bureau an application for pension in her own right under the provisions of section 4702, Revised Statutes, as widow of said deceased soldier, alleging that his death, upon the date aforesaid, was due to disease contracted in line of duty during his military service.

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Both of said applications were rejected on August 12, 1896, upon the ground that said Mary J. Vogler had never been lawfully married to the deceased soldier, and was not his widow; it being shown that she had a husband living at the date of her marriage to the soldier, to whom she had been lawfully married and from whom she had never been divorced, and who was still living.

Subsequently, upon additional evidence being filed to sustain the legality of the marriage of said Mary J. Vogler and the soldier, her claim for widow's pension was reopened and further considered, and on March 15, 1899, was again rejected upon the ground—

of no title as the legal widow of the soldier, it appearing from evidence obtained on special examination that the claimant has failed to prove that her marriage to her first husband, who is living and undivorced, was not valid.

From the rejection of both claims, as aforesaid, appeal was taken on May 11, 1899.

The facts in this case material to the issue presented by the appeal appear to be well established by the evidence, and are not disputed or controverted in any way. The appellant was first married on August 4, 1869, in the county of Shelby, State of Ohio, to a man named Henry Curtner. Very shortly after said marriage said Curtner exhibited evidences of insanity, and in 1871 was admitted to the asylum for the insane at Dayton, Ohio, violently insane, and has continuously remained an inmate of that institution from that time to the present, with the exception of two short intervals when the record shows he was discharged "unimproved."

The appellant continued to reside in Shelby County, Ohio, for some seven or eight years, when she left there and removed to Noblesville, Hamilton County, Ind., where the deceased soldier, Vogler, had preceded her, and was married to the soldier in that town on April 20, 1880, and continued to reside there with him as his wife until his death on April 26, 1896, four children being born to her of said marriage, and she is at present a resident of said county and State.

The appellant alleges and testifies that some five or six years after her first husband Curtner was first sent to the asylum she received a telegram from some person whom she was informed and believed was connected with that institution informing her that Curtner was dead, and desiring to know what disposition she wished made of his body, and that she replied stating that she desired it to be buried at the asylum. She states that from and after this time she believed her first husband was dead, and that it was so currently reported and believed in Shelby County, Ohio, where they had both resided, and that she married the soldier, Vogler, in good faith, believing that she was free to do so, and that her marriage to him was legal and valid, and that she continued to so believe until after the death of the soldier and

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after she had filed her application for pension as his widow, when it was discovered that her first husband was still alive and an inmate of the asylum for the insane at Dayton, Ohio. There is some testimony, obtained on special examination of this case in Shelby County, Ohio, which tends to support the foregoing statements of the appellant, and shows that it was the very general understanding and belief among the relations and friends of Curtner in that locality that he had been dead for a number of years. It may be stated, also, as an evidence of the apparent good faith of the appellant and her attorney in the case, that it appears in evidence that the first information or intimation given the Pension Bureau that the first husband of appellant was still living and undivorced from her was obtained from the appellant's attorney, who states that he discovered that fact while engaged in searching for positive and definite evidence of the death of Curtner in the State of Ohio, and immediately informed both the appellant and the Pension Bureau of it. It was upon the receipt of this information that both claims were first rejected, as above set forth.

Subsequently, the appellant commenced proceedings in the circuit court of Hamilton County, Ind., the place of her residence, to have her first marriage with Curtner judicially declared null and void on the ground of Curtner's insanity and incapacity to enter into a valid marriage contract at the date of his marriage to appellant in 1869; and on November 14, 1898, the following judgment and decree was rendered by said court, as appears from a duly certified and authenticated transcript of the same from the records of said court on file with the papers in this case.

STATE OF INDIANA, *Hamilton County, ss:*

Mary J. Vogler *v.* Henry Curtner. Hamilton circuit court, November term, 1898.

Be it remembered, that on the 14th day of November, 1898, the same being the seventh judicial day of November term, 1898, of the Hamilton circuit court, begun, held, and continued at the court-house in Noblesville, commencing on Monday, the 7th day of November, 1898, before the Hon. John F. Neal, judge of said court, the following judgment and decree was rendered in the above-entitled cause, to wit: Mary J. Volger *v.* Henry Curtner. 11690.

Comes now the plaintiff and shows to the court by the affidavit of Will H. Craig, one of the publishers of the Ledger, a weekly newspaper printed and published in the county of Hamilton, State of Indiana, that due notice of the pendency of this action has been given to said defendant by publication in said newspaper for three weeks, successively, to wit, on the 23d and 30th days of September and the 7th day of October, 1898, notifying said defendant to be and appear in this court to answer to said complaint on this the 14th day of November, 1898; which affidavit and copy of notice so published are now filed, and are in the words and figures following, to wit: (Here insert.) And it is further shown to the court by the affidavit of Leo. J. Weinreich and the writ of summons herein issued that said defendant was duly summoned to appear herein by reading said summons to J. M. Radcliff, superintendent of the hospital for the insane at Dayton, Ohio, where said defendant is confined as an insane

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person, and also by then and there delivering to said defendant and to said superintendant each a copy of said summons, all on the 23d day of September, 1898, which summons and affidavit in proof of service of the same are in the words and figures following, to wit: (Here insert.)

And thereupon, on plaintiff's motion, said defendant is three times audibly called and comes not, but herein makes default. And it is now suggested to the court that said defendant is an insane person, confined in the hospital for the insane at Dayton, Ohio, and the court appoints Thomas E. Kane, an attorney of this court, guardian ad litem for said defendant, to appear and defend this action in his behalf. And comes now said Thomas E. Kane and accepts said trust, and files an answer to the complaint herein on behalf of said defendant denying the allegations of the complaint, which answer is in the words and figures following, to wit: (Here insert.) And thereupon this cause is submitted to the court for trial without the intervention of a jury; and the court, having heard all the evidence and being sufficiently advised, finds for the plaintiff, and that all the allegations of the complaint are true.

That in the year 1869 plaintiff and defendant were residents of the State of Ohio and, being unmarried, were in that year formally intermarried in the said State of Ohio, where they had their usual place of residence, but that at the time of entering into said marriage contract the said Henry Curtner was of unsound mind and incapable of contracting marriage or of consenting thereto, and had theretofore been adjudged insane and confined in the insane hospital, of all of which the plaintiff was ignorant, but believed that said defendant was of sound mind and capable of entering into a valid marriage contract, and in good faith believed that her marriage with him was lawful and valid, and in order to induce plaintiff to marry him at said time, defendant fraudulently concealed his insanity from the plaintiff and represented himself to be in all respects capable of entering into a valid marriage, on which representations plaintiff in good faith relied and was thereby induced to marry him as aforesaid.

That shortly after said marriage contract said defendant became a raving maniac, and has ever since been devoid of reason, and has been confined in the asylum for the insane at Dayton, Ohio, where he now is. And the court finds that said marriage was by the laws of the State of Ohio, as well as by the laws of this State, null and void.

That after the second confinement of said defendant in said hospital for the insane, the plaintiff was credibly informed that said defendant had died, and it was so currently reported and believed in the neighborhood where she lived. And more than six years after being so informed, during which time she had heard nothing to the contrary, to wit, on the 20th day of April, 1880, said plaintiff, in good faith, believing that she was competent to marry, was intermarried with one Andrew Vogler, at the county of Hamilton in the State of Indiana, she at the time in good faith believing that said Henry Curtner was dead, and she thereafter lived and cohabited with said Andrew Vogler as his wife in good faith until the 26th day of April, 1896, when said Andrew Vogler died at the said county of Hamilton. That plaintiff is the mother of four children born in said wedlock with said Andrew Vogler, namely, Roma E. Vogler, Sarah M. Vogler, Nellie I. Vogler, and Oscar V. Vogler.

It is therefore considered and adjudged by the court that the said marriage contract so entered into by the plaintiff and said Henry Curtner was, and the same is, null and void, and the same is hereby held for naught as though the same had never existed, and the said marriage of plaintiff with said Andrew Vogler is adjudged and decreed to be valid, and that she is the lawful widow of said Andrew Vogler and the said children are the legitimate children of plaintiff and said Andrew Vogler, all of which is ordered, adjudged, and decreed by the court. And it is further ordered that plaintiff pay all cost in this proceeding.

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STATE OF INDIANA, *Hamilton County, ss:*

I, C. B. Williams, clerk of the Hamilton circuit court of the county of Hamilton, in the State of Indiana, do hereby certify that the foregoing is a true and complete copy of the judgment and decree of said court in the above-entitled cause on the day and year first aforesaid, as appears of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of the said court at my office at Noblesville this 8th day of December, A. D. 1898.

[SEAL.] C. B. WILLIAMS,
Clerk of Hamilton Circuit Court.

The foregoing decree of the circuit court of Hamilton County, Ind., was rendered by a court of record of general original jurisdiction both in law and equity, which undoubtedly had jurisdiction over the subject-matter involved in said proceeding, and the residence of the appellant, the plaintiff therein, was the proper venue in which to commence such proceedings. The decree shows upon its face that it was in no sense an ex parte proceeding, service having been obtained upon the defendant, Curtner, in accordance with the requirements of the law of the State of Indiana in the case of nonresident and insane and infant defendants. Furthermore, it appears that the rights of the defendant were carefully conserved, his insanity having been suggested to the court and a guardian ad litem appointed for him, who appeared at the hearing of the case and entered a general denial, putting the plaintiff upon proof of all the allegations made in her bill or complaint. It is clear therefore that said court acquired full and complete jurisdiction of the parties to said proceeding, and had unquestioned jurisdiction, as a court of equity, to hear and determine said cause, and to declare and adjudge the legal status of said parties under the laws of the State of Indiana, as affected by the marriage of the appellant to said Curtner. The decree recites that the court, having heard the evidence, proceeded to find the facts in the case as therein set forth, and found that at the date of his marriage to the appellant said Curtner was non compos mentis, insane, and incapable of making and entering into a valid marriage contract, and that this fact was unknown to the appellant, and declared and adjudged said marriage between appellant and Curtner absolutely null and void, both under the laws of the State of Ohio, where it was contracted, and under the laws of the State of Indiana, where she resided. As a necessary corollary to this finding, the court also adjudged and decreed the marriage of the appellant with the deceased soldier, Vogler, to be legal and valid under the laws of the State of Indiana, and that she was the lawful widow of said Vogler, and that the children born of said marriage were the legitimate children of the deceased soldier.

This decree, so far as it affected the legal status of the parties to the record, was in the nature of a judgment in rem, and, there being no suggestion of fraud or collusion in its procurement, is binding on the whole world. (Freeman on Judgments, 2d ed., sec. 313.)

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The authority and jurisdiction of a court of equity to inquire into and annul, by decree, a marriage on the ground of the mental incapacity to contract of one of the parties to such marriage is well settled, and has been directly upheld by the supreme court of the State of Ohio, where the marriage of the appellant and Curtner was contracted, in the case of Waymire, guardian of Wiles, *v.* Jetmore et. al. (22 Ohio St., 271). This was a suit by the guardian of an imbecile to set aside and annul a pretended marriage of his ward because of the mental incapacity of said imbecile to consent to or contract said marriage, and the general doctrine controlling courts of equity in such cases was well stated by the court as follows:

Marriage is a contract relation founded in the mutual consent of the parties, on which account consenting capacity is essential to its consummation. Consequently the want of such capacity, in either party, renders the relation meretricious, not matrimonial. Such is the immemorial and universal judgment of civilized society. (1 Bl. Com., 439; 2 Kent's Com., 40, 41.) Hence, the marriage of parties, either of whom lacks the capacity to consent, is ineffectual and void ab initio. This disposes of the first and fundamental proposition suggested by the record.

Congenital, or other mental imbecility, is not among the statutory causes of divorce. These causes generally import a preexisting valid contract, or a contract voidable only; which, when they, or some of them supervene, will, for such cause, be judicially avoided. But this record does not present a case for judicial nullification and avoidance under the statute, the pretended marriage being a nullity and void already. Does there, then, exist any necessity for judicially declaring such nullity, and will a court of equity, in the exercise of its ordinary powers, entertain jurisdiction to do it?

Social order and public decency demand that the parties to a meretricious relation in which the forms of marriage, apparently legal, seem to bind them, should be judicially relieved therefrom. This alone is sufficient cause for the interference of whatever tribunal possesses the adequate powers. But the succession of property and the legitimacy of inheritance, which the law regards with peculiar jealousy, furnish a no less controlling motive for such interference. The want of consenting capacity, resulting from causes other than infancy, which is generally declared and the period thereof fixed by statute, is determined in every instance by the testimony of witnesses only. Therefore, while the parties are in esse and the witnesses accessible, it is of the greatest importance that every cloud which might obscure the succession or involve the inheritance should be removed rather than remain to foster future and consuming litigation. To this end a court of equity, in the exercise of its ordinary powers, will entertain jurisdiction, at the suit of the imbecile's guardian, to declare his marriage a nullity, as it does to order the surrender and cancellation of a forged or otherwise void instrument. The propriety of such jurisdiction is fully recognized by Chancellor Kent in Weightman *v.* Weightman (4 Johns, ch. 343), and by the supreme court of North Carolina in Crump *v.* Morgan (3 Ired. Eq., 91).

There would seem to be, therefore, no valid or tenable ground for questioning the jurisdiction of the court to render said decree, and if the jurisdiction of the court in the premises be conceded, the legal effect of said judgment and decree was undoubtedly to remove the apparent impediment theretofore existing to the marriage of the appellant to the soldier, Vogler, to render said marriage valid, legal, and binding under the laws of the State of Indiana, and to fix the

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legal status of the appellant in that State as the lawful widow of the soldier. To this extent the Department is of the opinion that said decree is binding and conclusive, not only upon the parties to said record, but upon the whole world.

The second section of the act of August 7, 1882, provides:

> That marriages, except such as are mentioned in section 4705 of the Revised Statutes, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage, or at the time when the right to pension accrued.

In the present case the residence of the parties, both at the time of the marriage of the appellant to the deceased soldier and at the time when her right to pension as his widow accrued, provided it be shown that she has any such right under the provisions of the law, was the State of Indiana, where the appellant still resides. Consequently the decree of a court having jurisdiction and authority so to do, adjudging and declaring her marriage to the deceased soldier legal, valid, and binding under the laws of that State, must be accepted, under the provisions of said act of August 7, 1882, as establishing the legality of said marriage, and the appellant should be accepted as the widow of the soldier for pensionable purposes.

It does not affect the force and validity of the decree of nullity, provided it was legal and regular in all other respects, as has been shown to have been the case in the present instance, that it may have been procured in furtherance and aid of the prosecution of appellant's application for pension. Said court unquestionably had jurisdiction to declare the law of the State of Indiana relative to the marriage of the appellant to the soldier, and her legal status as his widow thereunder. It has done so in a perfectly regular and proper proceeding, wherein no fraud or collusion is shown or charged, and there is no valid or legal ground or reason whatever for declining to accept the judgment of said court as fully establishing the legal status of the appellant as the widow of the soldier under the laws of the State of Indiana.

It may be remarked, incidentally, that the great preponderance of the testimony obtained on special examination of this case tends to sustain and support the finding of facts by the court in said decree of nullity, and to establish the fact of the insanity of the appellant's first husband, Curtner, at the date of her marriage to him in 1869. It is neither necessary nor proper to consider in this case whether or not said testimony is sufficient to show conclusively that Curtner was so insane at that time as to be mentally incompetent to contract a valid marriage, that question being, in the opinion of the Department, res adjudicata, a court of competent jurisdiction, with all the parties and all the facts before it, having decided that he was, and that his marriage to the appellant was a nullity, and absolutely void ab initio.

The Department is clearly of the opinion, from the foregoing, that

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the appellant should be accepted, under the record and the evidence in the case, as the lawful widow of the deceased soldier, Vogler, for pensionable purposes.

The rejection of the claim of the deceased soldier for additional invalid pension, and of the claim of the appellant for widow's pension upon the ground stated is, therefore, hereby reversed and set aside, and you are directed to cause said claims to be reopened, further considered, and readjudicated upon their merits, accepting the appellant as the pensionable widow of the deceased soldier. The papers in the case are returned herewith.

MARRIAGE OF SLAVES IN MARYLAND—LEGITIMACY.

SAMUEL TUTTLE (FATHER).

Under the laws of Maryland, slaves might legally marry, and the issue of their marriages was legitimate.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 15, 1901.

This appellant, Samuel Tuttle, on October 11, 1898, filed a claim, No. 684670, for pension, under the Revised Statutes, as father of Alexander Tuttle, deceased, who was a member of Company C, Twenty-fourth United States Infantry, and was killed July 1, 1898, in the battle of San Juan Hill, Cuba, as shown by the records of the War Department.

Said claim was first rejected in March, 1900, on the ground that the soldier was not the legitimate son of the claimant, the latter having never been legally married to the soldier's mother.

Record evidence of the claimant's marriage in June, 1860, in Prince George County, Md., to the soldier's mother, both of whom were then slaves, being subsequently filed, the claim was reopened and was again rejected in July, 1900, on the ground that "slave marriages are not recognized by the Maryland statute," as valid; and on August 30, 1900, the claimant, through his attorneys, appealed, contending merely that his said marriage to the soldier's mother was valid.

In view of the appellant's present necessitous circumstances, his appeal is taken up out of its regular order and given immediate consideration.

It appears from the evidence herein that this claimant and the mother of the soldier were formally married in the State of Maryland on June 3, 1860, with the consent of their owners; that they continued to reside in that State, living and cohabiting and being recognized generally as husband and wife until 1869, when they removed to the city of Washington, in the District of Columbia, and remained in said district, still cohabiting and being universally recognized as husband

and wife until her death in 1877. The soldier was born to them in 1866. He enlisted in 1885.

Section 4705 of the Revised Statutes, providing that certain proof as to marital relations of colored soldiers shall be sufficient for pensionable purposes in claims by the alleged widows and children of such, has no application in this case as said section expressly limits its application to claims on account of those soldiers only who enlisted prior to March 3, 1873.

This claim, therefore, must be decided "according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued," as provided by the act of August 7, 1882.

Generally, slaves were considered to be incompetent to contract marriage and their children were not considered legitimate. Under the laws of Maryland, however, where the marriage in this case was formally celebrated by a minister, it appears slaves might, certainly with consent of masters, legally marry, although no civil rights were thereby conferred.

The laws of 1777, chapter 12, section 11, provided

that if any minister shall wilfully publish the banns of matrimony between any servants or between a free person and a servant, or if he shall wittingly celebrate the rites of matrimony between any such, without leave of the master or mistress of such servant, he shall forfeit and pay for every offense fifty pounds current money.

In the case of Jones *v.* Jones (36 Md., 457), the court of appeals of Maryland held that this law "authorized servants to marry with the assent of their owners, and whatever the law may have been in this respect before," they say, "they could lawfully marry thereafter. Although the marriage would not confer civil rights upon them, and in no manner change or effect the relation of master and slave, yet it was legalized and consequently the issue would be legitimate."

The court in that case say further as to the legal status of slave marriages:

There are cases in which marriages contracted between parties not capable of contracting at the time of marriage are made valid by subsequent ratification of the parties, as in case of lunatics and infants, and that without any other or new celebration. * * * We think that the same law should apply to the cases of marriage between slaves who ratify the marriage after they become free.

And when the same case was, later, again before that court they adhered to this holding as to the legality of slave marriages, and also held such to be valid whether with or without consent of the master. (S. C., 45 Md., 144.)

They say:

The seventh prayer was also properly refused. It embodied the proposition that without the consent of the master the marriage of the slave was actually void. There is no warrant for this in the law of this State. The statute of 1777, chapter 12, prohibited ministers of the gospel from publishing the banns or celebrating matrimony between servants or a servant and a free person, under penalty, without the

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consent of the masters. But the statute did not declare the marriage void, nor was that the operation of it. The minister subjected himself to a fine, but the marriage was valid.

And the supreme court of the District of Columbia has also held, in the case of Thomas *v.* Holtzman (18 D. C., 62), that where slaves, with the consent of their masters, lived together in the State of Maryland as husband and wife, such a union, according to the custom of that State, was sufficient to establish a marriage between the parties, and the issue thereof would be legitimate and entitled under the act of Congress of February 6, 1879, to inherit in the District of Columbia.

Slavery was abolished, by statute, in the State of Maryland in December, 1864; and on March 22, 1867, the legislature of that State passed the following act, now embodied in section 13, chapter 62, of the Code of Public General Laws (Maryland):

All marriages made and celebrated in this State prior to March 22, 1867, by and between colored people are hereby confirmed and made valid, to every intent and purpose, from the time of the celebration of such marriages, respectively; and every such marriage shall be held and taken by all courts of this State to be good and sufficient in law to all intents and purposes, provided that in every case the parties claiming to have been married by a competent person shall, by sufficient proof before some justice of the peace establish the fact of having been so married, a certificate of which shall be filed with the clerk of the circuit court of the county in which said marriage was celebrated, or the court of common pleas of Baltimore city, and be preserved with the register of marriage licenses in the office of said clerk.

Viewing this case in almost any of its various legal aspects, it would seem that the soldier must be held to have been the legitimate son of this claimant. Under the Maryland statute of 1777, as construed by the highest appellate court of that State, the claimant's marriage in June, 1860, to the soldier's mother was legal and the soldier, born of that marriage, a legitimate son.

The decision in the case of Jones *v.* Jones, supra, is directly in point in this case and would appear to be decisive of this on the question presented.

If, however, it be considered that the act of 1777 does not warrant the holding that slave marriages in Maryland were legal and their issue legitimate, the act of March 22, 1867, above quoted, would appear to be conclusive in support of such holding. It is true, the latter act couples its positive, absolute, and comprehensive declaration of the validity "to every intent and purpose" of such marriages with the proviso that the parties claiming such a marriage shall establish it by certain proof and record a certificate thereof. But these directory provisions of that act are entitled to no greater legal effect than the ordinary directory requirements of most of the State statutes as to marriage license, celebration, etc., a failure to comply with which requirements is held not to invalidate a marriage which is otherwise valid (Meister *v.* Moore (96 U. S., 76); Blackburn *v.* Crawford (3 Wallace, 175)).

It would seem clear, as a matter of law, that under the act of March

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22, 1867, if not under that of 1777, this claimant's alleged marriage in June, 1860, should be considered as valid, notwithstanding it has not, so far as appears, been established in the manner prescribed in the former act.

And this marriage would also appear to be valid under the doctrine of ratification announced in the decision in the case of Jones *v.* Jones, supra. The claimant and the soldier's mother, after they became, in 1864, free persons under the laws of Maryland, continued for many years to cohabit as husband and wife, and they thereby ratified their original marriage, which thereupon unquestionably became valid, according to that decision, if it were not valid before. The legitimacy of the soldier, born in 1866, while his father and mother were cohabiting as free persons, would appear, under this theory, to be clearly established.

And, finally, the act of Congress of February 6, 1879, would appear to have also an important bearing on the question of this soldier's legitimacy, if it be considered that there was no valid marriage according to the law of the place where this claimant's marriage was contracted.

According to the act of Congress of August 7, 1882, above quoted, marriages are provable in pension claims, either by the law of the place where contracted or where the parties resided at the time the right to pension accrued, which in this case is the District of Columbia.

Said act of February 6, 1879, reads as follows:

> That the issue of any marriage of colored persons, contracted and entered into according to any custom prevailing at the time in any of the States wherein the same occurred, shall for all purposes of descent and inheritance and the transmission of both real and personal property within the District of Columbia, be deemed and held to be legitimate, and capable of inheriting and transmitting inheritance, and taking as next of kin and distributee according to law, from and to their parents, or either of them, and from and to those from such parents, or either of them, may inherit or transmit inheritance, anything in the laws of such State to the contrary notwithstanding: *Provided*, That nothing herein shall be construed as implying that any such marriage is not valid, or such issue legitimate for other purposes.

The supreme court of the District of Columbia held in the case of Thomas *v.* Holtzman, supra, that legitimacy is established under this act by proof of cohabitation as husband and wife in the State of Maryland of slaves, with consent of their master.

And irrespective of this act of February 6, 1879, it would seem that a marriage per verba de presenti might well be presumed from the matrimonial cohabitation of claimant and soldier's mother in the District of Columbia from 1869 until her death in 1877; such marriage being held by the Department to be valid in said District. See case of Annie Higgins (10 P. D., 110), and said case of Thomas *v.* Holtzman cited therein.

Rejection of this claim is, therefore, reversed, and you will readjudicate the claim accordingly.

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SERVICE—WAGON MASTER—MUSTER.

MARGARET GRIFFIN (WIDOW).

It appearing from the official record in the War Department of the deceased soldier's military service that he was duly enlisted and mustered into the military service of the United States, and subsequently honorably discharged therefrom, it is immaterial whether he was enlisted and served as a "wagon master" or not; he was an enlisted man in the military service of the United States, and as such occupied a pensionable status under the law. The rejection of the appellant's claims for pension as the widow of the soldier upon the ground that he had rendered no service in the military or naval service of the United States was, therefore, erroneous, and is reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 13, 1901.

Margaret Griffin filed in the Pension Bureau on April 20, 1889, an application for pension under the provisions of section 4702, Revised Statutes, as widow of George Griffin (deceased), late "wagon master," Thirty-fifth Indiana Volunteer Infantry, alleging the death of said soldier on September 12, 1883, from disease contracted in line of duty during his military service.

This application was originally rejected on April 1, 1897, upon the ground that no connection was established by the evidence between the death of the soldier and his military service.

On February 3, 1894, while the aforesaid claim for widow's pension under the general law was pending, said Margaret Griffin filed an application for pension under the provisions of the third section of the act of June 27, 1890, as the widow of said soldier, which was likewise rejected on June 28, 1897, upon the ground that it had been determined from the official records of the War Department that the deceased soldier had rendered no service in the military or naval service of the United States during the war of the rebellion.

Subsequently the rejection of both of said claims for widow's pension was adhered to, upon the ground that it appeared from the official record in the War Department of the service of said George Griffin that he was not in the military service of the United States as alleged.

From the rejection of both claims for widow's pension, as aforesaid, appeal was taken on October 24, 1898.

It appears from the official records of the War Department that—

George Griffin was enrolled on the 21st day of December, 1861, at Jeffersonville, Ind., in Thirty-fifth Regiment of Indiana Volunteers, to serve three years, or during the war, as wagon master. On the muster-in roll of field and staff of that regiment for the month of December, 1861, he is reported present. Muster-out roll, dated September 30, 1865 (next on which borne), shows him discharged, without date.

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It also appears, by a certificate of the adjutant-general of the State of Indiana, that the official records on file in his office show that—

George Griffin joined for duty and was enrolled as a wagon master of Thirty-fifth Regiment Indiana Volunteers at Jeffersonville, Ind., on the 21st day of December, 1861, by Col. Z. C. Walker, and that he was duly mustered into the military service of the United States at Indianapolis, Ind., on the 21st day of December, 1861, for the term of three years, by Major Carpenter, U. S. A., mustering officer. Mustered out September 30, 1865.

On April 4, 1893, this certificate was referred to the Record and Pension Office of the War Department to determine whether the statements therein contained could be accepted as correct, and on April 19, 1893, the following reply was received:

The date of discharge of George Griffin, wagon master, Thirty-fifth Indiana Volunteers, can not be determined from the records of this office, and the inclosed certificate of the adjutant-general of the State of Indiana can not be accepted as sufficient to establish such date.

On April 27, 1897, the Commissioner of Pensions addressed a communication to the honorable the Secretary of the Interior, transmitting therewith the papers in this case—

with the request that the honorable the Secretary of War be asked to direct the Adjutant-General to fix a date which may be accepted as the termination of this soldier's service in the Army of the United States, under his enlistment of December 21, 1861, or any veteran reenlistment based thereon; and to also request that he state whether or not such a termination from the service can be considered as an honorable discharge from the service of the United States.

This request having been complied with, the following communication, dated June 1, 1897, was received from the War Department:

The muster-in roll of the field and staff of the Thirty-fifth Indiana Infantry Volunteers, dated December 11, 1861, reports George Griffin, "wagon master," enrolled at Jeffersonville December 21, 1861, and mustered by Maj. S. D. Carpenter December 21, 1861. This man's name is entered at the end of the roll, evidently as an afterthought, when it was found necessary to employ someone to take charge of the moving of the wagons of the regiment; and, in ignorance that there was no such military rank as "wagon master" known to the service, and that the persons performing that duty were employed and paid by the Quartermaster's Department.

No further record of this man's "muster in" to service, nor any further record of him whatever, has been found, except that his name is taken up on the muster-out roll of the field and staff, dated September 9, 1865, with the remark "discharged." This entry is explained by the fact that it was required that every man whose name had previously appeared on any of the rolls of an organization should be accounted for in some way on the muster-out roll of that organization.

Upon inquiry at the office of the Auditor for the War Department it has been learned that there is no record in that office of any payment to this man as a soldier.

In view of the facts of record in this case, especially the fact that the organization of the volunteer forces did not provide for regimental wagon masters, nor for any wagon masters, except, as stated above, civilians who were employed and paid as such by the Quartermaster's Department, this man is not regarded by this Department as having been in the military service of the United States as claimed.

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This decision of the War Department that the appellant's deceased husband was not in the military service of the United States is the basis of the action upon which her claims for widow's pension now stand rejected, but, in view of the facts shown by the official record of the soldier's military service, and conceded by the War Department, this Department is unable to agree with or concur in said conclusion. It has uniformly been, and is now, the practice of this Department to accept the facts recited in the official records of the War Department relative to the military history and service of a soldier as binding and conclusive, nor will evidence be admitted in the prosecution of a pension claim to dispute or controvert the facts stated in said record, and any error therein must be corrected, if at all, by the authorities of the War Department; but the legal conclusions and deductions drawn by the officers of the War Department from such facts are not, and have never been held to be conclusive and binding on this Department, although such conclusions are very strongly persuasive and are, and should always be, entitled to the highest consideration and respect. In the present instance it is shown by the official record of the deceased soldier's service, and admitted by the officers of the War Department that he was duly enlisted and enrolled, and regularly mustered into the military service of the United States by an officer of the Regular Army detailed for that duty. There was, therefore, not only a proper tender of service on the part of the soldier, but an acceptance of that service by the Government, acting by and through its duly authorized officer and agent, and there is no escape from the conclusion that the soldier thereby became, and was a duly enlisted man in the military service of the United States, and that his service was performed as such under a valid enlistment, no matter what may have been the character of such service, or by what name or rank he may have been called or designated. It is no sufficient reason for disregarding this soldier's enlistment and service that he may have been designated as "wagon master" at his enlistment and muster in, when there was no such military rank known to the service under the Army Regulations, and the persons performing that duty were usually employed as civilians and paid by the Quartermaster's Department. He was, notwithstanding, an enlisted man, and it makes no difference by what name or supposed rank he was designated in the service or the character of the duties to which he was assigned. Even if the Army Regulations had recognized the rank and office of "wagon master," it would have been a noncommissioned office or rank, to which only an enlisted man could have been appointed, and the soldier could not have been properly and legally enlisted and mustered into service as a "wagon master," any more than if no such military rank had existed, but his appointment thereto must, necessarily, have followed his enlistment. It can make no possible difference, therefore, that he was designated on the

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muster-in roll as a "wagon master," a rank not known to the service. The fact that a duly enlisted man may have been designated by a name and rank not recognized by the Army Regulations, and detailed to perform certain duties usually performed by civilian employees of the Quartermaster's Department, does not render him any less an enlisted man in the military service of the United States, and can not by any possible construction or course of reasoning affect his status as a soldier, or put him out of the military service of the United States.

As a matter of fact, it is shown by reports from the office of the Quartermaster-General of the Army, on file with the papers in the case, that the deceased soldier never was employed and paid by the Quartermarter's Department as a "wagon master," or civilian employee of any kind at any time during his service. Furthermore, the record shows that the deceased soldier's service was terminated by a discharge. The muster-out roll of the field and staff of the Thirty-fifth Indiana Volunteer Infantry shows him discharged, but does not give the date of his discharge. The explanation of this fact given in the foregoing communication of the War Department does not in any way tend to indicate that he was not regularly in the service, or controvert the fact that he was an enlisted man. On the contrary, it is a direct admission and concession that the soldier was an enlisted man, and therefore it was necessary and requisite that he be accounted for on the muster-out roll of the organization. If he had never been in the military service of the United States, but was merely a civilian employee of the Quartermaster's Department, it would neither have been necessary nor proper to have taken up his name and accounted for him on the muster-out roll; but his name having previously appeared on the rolls of the organization as an enlisted man, it was required that he be accounted for on the muster-out roll, which was done by reporting him "discharged." That he was "discharged," as shown by the record, is not disputed and can not be denied, and if he was so "discharged" he must, necessarily, have been an enlisted man. The Department is, therefore, of the opinion that the official record of the deceased soldier's military service clearly and indisputably establishes the fact that he was a duly enlisted man in the military service of the United States, and that his said service was terminated by a discharge which, in the absence of anything to the contrary, must be presumed to have been an honorable discharge.

The benefits of the general pension laws are extended by the provisions of section 4693, Revised Statutes, to "any enlisted man, however employed, in the military or naval service of the United States, or in its Marine Corps, whether regularly mustered or not, disabled," etc.; and the third section of the act of June 27, 1890, provides a pension, under the conditions therein prescribed, for the widow of "any officer or enlisted man who served ninety days or more in the Army or Navy

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of the United States during the late war of the rebellion, and who was honorably discharged," etc.

Although the official record of the deceased soldier's service fails to indicate the exact length of time he served, or when, or how he was discharged, further than has been above indicated, the testimony obtained by a special examination of this case of officers and comrades who served in the same regiment with the soldier clearly and satisfactorily establishes the fact that he did actually serve therein under said enlistment from the date of his muster in until some time about the month of June, 1862, or even longer, a much longer period, in any event, than ninety days.

The record evidence and the testimony in this case, therefore, unquestionably show that the military service of the deceased soldier was a valid and legal service for pensionable purposes, and amply sufficient to give this appellant a pensionable status as his widow under both of the foregoing provisions of the law.

The rejection of the appellant's claims for widow's pension upon the ground that her deceased husband was not in the military service of the United States is, therefore, hereby reversed and set aside, and you are directed to cause the same to be reopened, reconsidered, and readjudicated upon their merits, accepting the military service of the deceased soldier as sufficient to give the appellant a pensionable status as his widow, both under the provisions of section 4202, Revised Statutes, and under the third section of the act of June 27, 1890.

Attention is invited to the fact that in the foregoing nothing has been passed upon and decided other than the question of the sufficiency of the military service of the deceased soldier for pensionable purposes, all other questions and matters pertaining to the general merits of the case being properly left for the consideration and determination of the Pension Bureau upon readjudication of the claims.

DESERTION—MILITARY AGE—OATH OF ENLISTMENT.

NATHAN LOEB, ALIAS NATHAN LYONS.

Appellant's name was dropped from the roll on the ground that he was a deserter from a former enlistment. The contention is that he was under 16 years of age at the time of his first enlistment in September, 1863, and is therefore not barred on account of such desertion. In his oath of enlistment he reported his age as 18 years. He is bound by this action.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. March 26, 1901.

Nathan Loeb, alias Nathan Lyons, was a member of Company I, One hundred and eighty-eighth Ohio Volunteer Infantry, from January 23 to September 25, 1865. On July 9, 1890, his name was placed

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on the pension roll under the provisions of the act of June 27, 1890, at the rate of $8 per month by reason of a disability resulting from rheumatism and catarrh. On May 2, 1892, he filed a claim presumably for additional pension, alleging chronic diarrhea, malarial poisoning, piles, disease of nervous system, liver, head, brains, and defective sight and hearing, in addition to the causes for which he was pensioned. This claim was adjudicated and denied on May 5, 1893, and at the same time the medical referee recommended the dropping of the claimant's name from the roll on the ground that a ratable disability had ceased to exist.

Similar action seems to have been taken on November 1, 1895. Why the claimant's name was not dropped in accordance with said recommendation does not appear from the record.

On January 15, 1897, his name was dropped from the roll on the legal ground that the records of the War Department show that he is a deserter from a former service, and consequently was not honorably discharged from all service during the war of the rebellion.

On November 25, 1898, the soldier filed an application for restoration to the pension roll, admitting that he enlisted in the Fifteenth United States Infantry on September 14, 1863, and that he deserted from said organization as charged on January 11, 1865. He further contends that he was at the time of his first enlistment a minor under the age of 16 years, and for that reason such desertion is no bar to his claim under the act of June 27, 1890.

His claim for restoration was denied on May 3, 1899, on the ground that he deserted from Company A, Fifteenth United States Infantry on January 11, 1865, which charge has never been removed.

On November 26, 1898, he appealed from the action of dropping his name from the rolls, and on June 17, 1899, he appealed from the rejection of his claim to restoration, resting upon the contention that he was a minor under 16 years of age at the date of his first enlistment and for that reason the act of desertion, which he admits, constitutes no bar to pension under the ruling of the Department in the case of Jasper M. Stine (9 P. D., 488).

The claimant swears that he was born on May 25, 1848. In support of his claim for restoration was filed on January 6, 1899, the affidavit of Theresa Loeb, who deposes that she is the aunt of the claimant; that he was born about May 25, 1848; that his mother died in June, 1848, when he was about three weeks old, when he was sent to her to be raised; that in the fall of 1861, when he was about 13½ years old, he ran away from her and went out as a drummer boy without her knowledge or consent; that affiant believes that claimant's father, who is now dead, did not consent to his enlistment.

According to this evidence the soldier would have been under the age of 16 years at the time of his first enlistment, but it is contradicted

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by a report from the office of the Adjutant-General dated November 16, 1896. In said report he is thus described:

Nathan Loab, born in Claiborne, Ala.; aged 18 years; by occupation a laborer; black eyes, black hair, dark complexion, 5 feet 3 inches high; was enlisted September 14, 1863, at Providence, R. I., in the Fifteenth United States Infantry, and joined Company A, third battalion of that regiment December 1, 1863, at Fort Adams, R. I. Muster roll, January and February, 1865, reports him "deserted January 11, 1865, at Lookout Mountain, Tennessee;" a private. Was a private during service. Not reported sick on any muster roll. He is a deserter at large.

The above description as it relates to the age and place of birth must have been furnished by the claimant himself, since it does not appear that he had the consent of his parent or guardian.

On February 13, 1862, Congress passed an act, entitled "An act making an appropriation for completing the defenses of Washington, and for other purposes."

The second section of said act is as follows:

And be it further enacted, That the fifth section of the act of twenty-eighth September, eighteen hundred and fifty, providing for the discharge from the service of minors enlisted without the consent of their parents or guardians, be, and the same hereby is, repealed: *Provided*, That hereafter no person under the age of eighteen shall be mustered into the United States service, and the oath of enlistment taken by the recruit shall be conclusive as to his age. (12 Stat. L., 339.)

It is fair to assume that the record above quoted, showing the age of the claimant to be 18 at the time of his first enlistment, was founded upon the oath of enlistment, and is therefore binding upon him. The case of Jasper M. Stine, upon which he relies, has no relevancy here, since Stine enlisted in 1861, before the passage of the act of 1862, whereas the claimant enlisted after the passage of said act. It is not improper to note in this connection that it was only necessary for Stine to have shown that he was under the age of 18 at the time of his first enlistment, in 1861, since that was the minimum age of enlistment from March 16, 1802, to July 4, 1864. See sections 1116, 1117, 1118, Revised Statutes, and act of July 4, 1864, section 5 (Stat. L., 380). See also section 17, act of March 3, 1865 (13 Stat. L., 489).

Action affirmed.

DESERTED WIFE—ACT MARCH 3, 1899—DIVISION OF PENSION—NOTICE OF APPEAL.

EMILY ELLIS v. LEROY ELLIS.

In cases of contest over the division of pension under the act of March 3, 1899, the appellee is entitled to notice of the appeal and a copy thereof and reasonable time in which to file a brief and argument in support of the Bureau action appealed from.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, February 23, 1901.

Leroy Ellis, late private Company B, Eleventh Michigan Infantry, appealed July 30, 1900, from the Bureau action of May 11, 1900,

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allowing the deserted wife's claim of Emily Ellis, filed November 11, 1899, and awarding her one-half of his pension (Certificate No. 500352), under the provisions of the act of March 3, 1899.

The papers in the case show that issue was joined between the parties January 22, 1900, at which date the soldier filed an answer to his wife's application, in which he denied desertion, and also denied that his said wife was a woman of good moral character. Upon the issue thus framed, considerable testimony was filed by both parties, whereupon your Bureau on August 9, 1900, ordered a special examination to—

take such testimony as will settle beyond question whether claimant is a woman of good character.

An examination was had, and the testimony of the soldier was taken. It does not appear that the wife had any notice of this special examination, and her testimony was not taken, although recommended by the special examiner.

There is nothing to show that the appellee has been notified of this appeal, and she has filed no answer to the appeal or in any manner indicated that she has any knowledge thereof.

I am clearly of the opinion that in cases of contest over the division of pension under the act of March 3, 1899, the appellee is entitled to notice of the appeal and a copy thereof and reasonable time in which to file a brief and argument in support of the Bureau action appealed from, and that in the absence of such notice to the appellee the appeal should not be passed upon by this Department.

As there is no rule of practice applicable to this class of cases requiring service of notice by the appellant, this appeal will not be dismissed, but the papers are returned to your Bureau with the order that Leroy Ellis,appellant, shall within 30 days from the receipt of a copy of this decision cause to be served on Emily Ellis, appellee, or her duly authorized attorney, a copy of his appeal in this case, and file in the Bureau due proof of said service; that within 30 days after receipt of said copy of appeal said appellee may, either in person or by her attorney, file in the Bureau a brief or argument in answer to the contention of the appellant, or in support of the Bureau action appealed from, whereupon the papers shall be forwarded by the Bureau to this Department for decision of said appeal.

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DISLOYALTY—DURESS—LINE OF DUTY—SECTION 4716, REVISED STATUTES.

LORENZO PRUETT.

A prisoner of war who, while under actual duress and in well-grounded fear of his life, is forced by his captors to engage in mounting field guns and building fortifications for the use of such captors in active hostile operations, and is disabled while so engaged, without any free will on his part in such disloyal participation, is pensionable on account of such disability.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 30, 1901.

This appellant, Lorenzo Pruett, was a member, from March 17, 1864, to November 7, 1865, of Company C, One hundred and sixth United States Colored Infantry, and is now pensioned, Certificate No. 533335, under the act of June 27, 1890, at $12 per month, on account of loss of left eye, disease of right eye, and left inguinal hernia.

On May 10, 1886, he filed a claim under the Revised Statutes on account of said hernia, alleging it to have been contracted about September, 1864, while working on siege guns at Mobile, Ala. This claim was first rejected in October, 1889, on the ground that—

soldier was not in line of duty when the alleged injury was received. It is not admitted that a Federal soldier was in the line of duty while building forts and mounting siege guns for the enemy, even if he was a prisoner of war,

and again in February, 1896, the claim was rejected on the ground "that the soldier was not in line of duty when the alleged rupture of left side was incurred, nor in the United States service," the Commissioner of Pensions rendering at that time the following written decision in proceedings taken with a view to determine whether the claimant's present pension should be withdrawn on the ground of disloyalty, and whether the claim under the Revised Statutes should be reopened:

From the foregoing statement (made by the chief of the board of review as to the facts in the case), the work done by the soldier on the rebel fortifications was not voluntary, but done under duress. The thirty-day notice should not be given. The soldier sustained rupture or hernia while engaged in this work on the rebel fortifications. This will give no claim for pension under the general law. Although he was forced to do the work, it was not in the line of his duty, nor in the service of the United States. While he will lose no rights by it, he can gain no credit on account of it.

On November 9, 1898, the claimant, through his attorneys, appealed, contending that the alleged hernia should be held to have been contracted in line of duty in the service of the United States, the soldier being at the time a prisoner of war and actually forced, by physical violence, to perform the arduous labor which occasioned his rupture.

The records of the War Department fail to show existence of hernia

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at any time during service. They show, however, the claimant's capture September 24, 1864, his return "to duty from prisoner of war June 15, 1865," his presence for duty from date of return to discharge, and muster out with his company; also that he was allowed commutation of rations from September 24, 1864, to April 15, 1865. Regimental hospital records are not on file; and there are no hospital records of Mobile, Ala., where he alleges he received hospital treatment.

In an affidavit filed January 7, 1889, claimant states the date of incurrence of his rupture given in his original declaration is erroneous, the proper date being about February 10, 1865.

He gives the following account of the manner of incurrence:

> While a prisoner of war in Mobile, Ala., in the fall of 1864, it was the law of the prison authorities that the prisoners should go out and work on the prison forts, and in case they refused to work they were stripped and whipped until they would go to save their lives; and at the very time I got ruptured I was forced by them to go on the works and I was stooping down holding the siege gun timbers when one of the guards struck me such a blow with a wood strap that I endeavored so hard to lift the timber that it brought on the rupture, and I was then compelled to go to the doctor for help and he got the rupture back and put a truss on me, and from that day to the present time I have not been able to do a hard day's work.

In support of these allegations there are filed the affidavits of two comrades who were prisoners with claimant, and were with him at the time of incurrence, they say, one of them helping him to the surgeon's at that time. Neither, however, narrates the particulars of incurrence, or makes any mention of special force being used at the time to make the claimant do this particular work, as he alleges. But while in prison they were compelled, they say, to work on the fortifications; and one adds that in case any refused to work, or did not work hard enough, such were whipped and beaten.

The captain of the company states that he knows the soldier was "of sound physical health" prior to his capture, and was broken down and disabled on his return; that he was one of only eight, out of 107, who escaped the general massacre at Athens, by being taken prisoners; that they were separated in a day or two, and when claimant reported to him after exchange he complained of a hernia "which he said had been brought upon him by wheeling heavy loads of dirt at Mobile;" that soon after this he, said captain, was assigned to staff duty and saw no more of claimant until discharge.

This evidence would tend to show that the claimant's hernia was incurred as he alleges, while he was a prisoner of war and under immediate physical duress. The testimony of the captain as to claimant's statement, on return from the prison, of the manner of incurrence differs somewhat from that of claimant and of his other witnesses as to incurrence; but notwithstanding this slight conflict, it appears to be at least prima facie established that this hernia was incurred while

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claimant was, under direct compulsion, performing labor on the rebel fortifications.

Can a disability which is thus incurred be considered as having been incurred in line of duty in the service of the United States, and pension on account thereof be allowed accordingly?

I am clearly of the opinion that a disability so incurred may be thus considered and such pension allowed.

It is manifest that, as the Commissioner of Pensions held in 1896, the work on the rebel fortifications stated to have been done by this claimant was not a voluntary aiding and abetting of the rebellion, and could not operate to debar him, under section 4716 of the Revised Statutes, from his present pension.

That he was then in the military service of the United States, however, is unquestionable, although the "service" or work in which he was at this time employed was not that of the United States. The Commissioner of Pensions in his decision of 1896 has evidently used the phrase in the latter sense only.

This claimant being then an enlisted and undischarged soldier of the United States Army, he was in the service of the United States for pensionable purposes, and it is necessary for him to show only that the alleged disability was incurred while he was in line of duty as a soldier.

It is not disputed that he was in line of duty when captured. He was taken prisoner, it appears, during a severe engagement in which only seven others, out of a company of 107, thus escaped death, 99 being killed and 8 taken prisoners.

It has uniformly been held that a soldier is in line of duty, for pensionable purposes, during his confinement as a prisoner of war, if he was in the line of duty at the time he was captured, and that he is pensionable on account of any disability incurred while such prisoner.

It is unquestionable that a soldier who contracts a disability from scurvy, for instance, because of improper diet furnished him while he is such prisoner of war, is pensionable on account of such disability; or, if he should refuse to consume such diet and it was forced down his throat, or he was beaten so as to injure him physically it seems equally unquestionable that he would be pensionable on account of such injuries also. Or if he should be shot while attempting to escape from such imprisonment, it can not be doubted that he, or his widow in case of his death, would occupy a pensionable status.

The distinction between these plain cases and the case of this claimant is not clear. He was, it appears, actually forced by physical violence to work on the fortifications, and, when there, was forced still further, by actual physical violence, to exert himself to the utmost in performing the work required of him, and while so forced was injured. He might, it is true, have resisted, but resistance

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meant at least a stripping and beating, if not death; and he doubtless knew naught else to do, and there was, probably, from his statements at least, naught else for him in prudence to do than to perform the labor required of him. That he performed this labor inefficiently or reluctantly may be presumed from the fact, as stated by him, that he was actually beaten while at the work, in order to force greater exertions from him; and it was in consequence, directly and immediately, of this added force that he ruptured himself.

The vital question herein is whether the duress here alleged and testified to was such as to exempt this soldier from the consequences of his highly treasonable act of mounting siege guns and building fortifications for use against the United States.

Duress, in law, in order to constitute a defense in a civil action need not be extreme; but as a criminal defense it must, probably, be such as to produce a fear of death if obedience be not given, and must be direct, immediate, and impending (10 Am. and Eng. Enc. of Law, pp. 346–347).

In the case of Respublica *v.* McCarty (2 Dallas, Pa., 86), it was held that enlisting or procuring the enlistment of another in the service of a country with which the United States is at war is an act of high treason which nothing will excuse except the fear of death.

And in United States *v.* Haskell (4 Wash. C. C., 402), the court held that fear, to excuse a person participating in such a crime as mutiny on a ship, must be fear of death—such a fear as a man of ordinary courage and fortitude might yield to.

It would appear, therefore, that, both in law and in fairness and justice, this claimant should be allowed his defense of duress, and held to have been in the line of duty when he incurred his hernia. Certainly it would be most unfair and unjust for the Government, in whose loyal service he was captured by the enemy, and thereby, without his fault, placed in the position where, apparently, he must perforce either perform this labor which resulted in his disability, or else suffer death, now to deny him pension on account of such disability upon any legal technicality. His active loyalty to the Government of the United States was the direct cause which placed him under the dire circumstances by which he became thus disabled, without any fault on his part, unless it be considered a fault that he submitted at all to the requirements of his captors. But it appears, it was submission either to these requirements or to probable death, and to a fruitless death at that, of no avail to his country in its peril.

I am aware that to hold that one is entitled to pension on account of a disability which is thus incurred while he is engaged in active treasonable acts directed against and of great immediate damage and injury to his country and fellow-countrymen is opening the door, possibly, to those who are inclined to defraud, and that the granting of pensions

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in such cases may influence others similarly situated in the future to accede more readily than they otherwise would to such requirements by their captors to engage in active operations against their own country when they consider that they may receive a pension on account of any disability incurred while so engaged, and notwithstanding the treasonable character of such operations.

But it is not intended hereby to establish any general rule for application to all such cases. Each case must be decided upon its own facts—the necessity under which the party acted, his own good faith in the matter, and all the attendant circumstances of the case showing that the duress under which he was acting was absolute, certain, unqualified, and vital; that he had a well-grounded fear for his life, and that his own life was, in all probability, at stake.

I am, therefore, of the opinion that this claim should be submitted for thorough special examination in order to ascertain fully all the relevant facts and circumstances in this claimant's case, the witnesses to be interrogated specially and particularly as to the actual force used upon him in order to induce him to engage in the labor whereby he received his hernia, and in view of the conflicting testimony as to manner of incurrence of said hernia, also as to all the details of incurrence.

You will readjudicate the claim accordingly, and return all papers, with your report, upon completion of such readjudication, for the final disposition of the appeal.

MARRIAGE—LEGITIMACY—SLAVES—LAWS OF TENNESSEE.

REUBEN BURTON (FATHER).

The evidence in this case shows that this appellant married the mother of the deceased soldier in the State of Tennessee in 1844, according to the custom of slaves; that the deceased soldier was born of said marriage in 1845, and was always known and acknowledged as the son of the appellant; that the appellant and the mother of soldier lived and cohabited together as husband and wife, and were universally so known and recognized from the date of their slave marriage until the death of the latter in 1872; that they were so living together in the State of Tennessee on May 26, 1866, the date of the act of said State making said marriage legal and valid for all purposes, and legitimizing all the issue of such marriage. There is no competent or sufficient evidence in this case indicating that the appellant was not the father of the deceased soldier, and he should be accepted as such for pensionable purposes.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, March 30, 1901.

Rueben Burton filed in the Pension Bureau on August 14, 1896, an application for pension under the provisions of the first section of the act of June 27, 1890, as dependent father of George Burton (deceased), late a private in Company C, Forty-fourth United States Volunteer Infantry, alleging the death of said soldier in line of duty in hospital

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during his military service on October 11, 1865, unmarried, and leaving no wife or child him surviving, the death of the mother of said soldier on June 5, 1872, and his present condition of pensionable dependence.

Said application for dependent father's pension was rejected on August 2, 1900, upon the ground that said claimant was not the natural father of the deceased soldier. From said action appeal was taken on February 25, 1901.

The official record of the deceased soldier's military service shows that he enlisted as a private in the above-named organization on March 22, 1864, and served therein until October 11, 1865, upon which date he is shown by the record to have died in hospital at Chattanooga, Tenn. The evidence also shows that the soldier was never married, and left no wife or child him surviving.

It is also clearly established that this appellant and the mother of the soldier were, prior to the year 1844, slaves of different masters residing on adjoining plantations in the State of Tennessee, and that in that year they were duly married according to the custom of slaves prevailing in that State, with the consent and approval of their respective owners, and by a colored minister of the gospel. The evidence shows that very shortly after the marriage of the appellant and the mother of the soldier he was bought by the owner of his wife, whose name was Burton, and thereafter he resided on the same plantation with his wife, and occupied a cabin with her and raised a family of children, and that he then adopted the name of his new master, and has ever since been known by the name of Reuben Burton. The evidence shows that the appellant and the mother of the deceased soldier continued to live together as husband and wife from and after the date of their aforesaid slave marriage to the date of the death of the latter, which occurred in the State of Illinois in June, 1872, and that during all this period they were universally known, acknowledged, and recognized as husband and wife without question. It furthermore appears that they were so living and cohabiting together as husband and wife in the State of Tennessee on May 26, 1866, the date of the act of the legislature of that State legalizing and validating for all purposes the slave marriages of all colored persons in that State who were living together as husband and wife on that date, and declaring legitimate all the issue of such slave marriages. Furthermore, these parties are shown to have lived and cohabited together, and to have recognized and acknowledged each other as husband and wife, after their emancipation from slavery subsequent to the civil war, up to the death of the mother of the soldier in 1872.

A marriage between slaves, which has been ratified after the parties were emancipated, becomes a valid marriage in Tennessee, and is followed by all the legal consequences resulting from the marriage of white persons. (See case of Margaret Gilbert (8 P. D., 249), and authorities therein cited.)

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It is clear that both by the statutes and by the decisions of the courts of the State of Tennessee the slave marriage of this appellant and the mother of the deceased soldier became and was a perfectly valid and legal marriage, "followed by all the legal consequences resulting from the marriage of white persons," and the issue of said marriage were the legitimate children of said parties. It follows, therefore, that no ground exists, under the undisputed facts of this case, for refusing to accept the appellant as the pensionable parent of the deceased soldier because of the nature or character of the matrimonial relation that had existed between him and the mother of the soldier, or because of any invalidity or illegality of said marriage.

The exact date of the birth of the deceased soldier does not appear from the evidence, but it is shown by the testimony of white witnesses of undoubted respectability and credibility—members of the Burton family, who were raised on the same plantation with the soldier and knew him all his life, and others, near neighbors and relatives of the Burtons—that he was born some time in the year 1845, about a year after the marriage of the appellant and his mother, and after the appellant had been bought by Burton and was living with the soldier's mother as his wife on the same plantation. These same witnesses testify that the soldier was raised in the family of the appellant as his son, went by his name, and was universally known, acknowledged, and recognized on the plantation as the son of the appellant, and that the appellant never repudiated or denied the paternity of the soldier.

The only basis whatever in the testimony for the holding by which this case was rejected consists of an exceedingly indefinite and inconclusive statement by two of the witnesses, one white and one colored, that there was some suspicion and talk among the negroes on the plantation at the time of the birth of the soldier, and some dissatisfaction on the part of the appellant, growing out of the fact that the soldier was darker in color than either the appellant or his mother, which gave rise to an idle rumor that the appellant was not his father, but both of these witnesses state emphatically that they never heard or knew of the appellant disclaiming or denying the paternity of the soldier at any time, and they and all the other witnesses testify that the appellant always treated the soldier as a son, exercised the authority of a father over him, permitted the soldier to call him father, and in all respects acknowledged and treated him as he did his other children.

There is no stronger presumption known to the law than the presumption of the legitimacy of a child born in lawful wedlock, nor any that requires stronger or more conclusive evidence to rebut it. It is true that in this case at the time of the birth of the soldier his parents were slaves and their union was that of a slave marriage, but in the State of Tennessee a marriage between slaves, celebrated according to

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custom and with the consent of their respective owners, nas always been held a valid marriage, but not followed by all the legal consequences resulting from the marriage of white persons (Margaret Gilbert, supra). Here such a marriage was, by statute, fully and completely legalized and validated for all purposes, and the legal presumption of the legitimacy of the soldier and the paternity of the appellant is just as strong and just as difficult to rebut in this instance as though the parents of the soldier had been free white persons, duly married by ceremony and license in accordance with the requirements of the law of Tennessee.

Even if it had been shown by the evidence that the appellant had continuously and persistently denied the paternity of the soldier, such denial could not be alone accepted as sufficient to rebut and overcome the presumption of the legitimacy of the soldier, and when, as is found to be the case in this instance, there is no testimony worthy of the name of evidence indicating that the appellant was not the father of the soldier, there is no valid reason whatever for refusing to accept him as such for pensionable purposes or that can be urged in justification or support of the ground upon which this claim for pension stands rejected.

The rejection of said application for a dependent father's pension upon the ground stated is therefore hereby reversed and set aside and you are directed to cause said claim to be reopened and readjudicated on its merits, accepting the appellant as the father of the deceased soldier for pensionable purposes.

DEPENDENCE—LAWS OF MICHIGAN—HUSBAND AND WIFE.

THOMAS GARNER (FATHER).

The appellant obtains a comfortable support from a farm on which he resides with his wife and son, the title to said farm being in the wife.

Held, While section 6295, Statutes of Michigan, allows the wife to hold and convey property free from interference and joinder by her husband, yet the said statutes do not deprive the husband of the enjoyment and use of the wife's real estate, a right belonging to him under the common law.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 12, 1901.

Thomas, as dependent father of Phineas D. Garner, formerly a private in Company H, First Michigan Volunteer Light Artillery, a pensioner under the general law as amended by the act of June 27, 1890, was dropped from the rolls on May 19, 1898, on the ground of nondependency. An appeal from said action was filed on November 29, 1898.

The testimony taken at the special examination in this case shows that the appellant herein became a pensioner after the death of the soldier's

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mother. The appellant, together with his wife, live upon a farm of 120 acres, in a good farming district in the State of Michigan, and the said farm appears to be managed largely, that is so far as the practical management is concerned, by a son of appellant and his present wife. The title to this farm is in the appellant's wife, and has been for the last twenty years. It is claimed that the wife purchased it with her own money, but said title had previously been in appellant. The family live upon this farm, and although there has been an attempt made to show that the son rents it for two-thirds of the product, yet the wife admits that there is no writing regarding this matter, and it is apparent that the three persons mutually enjoy the profits. The appellant has but little personal property, probably not over $300 all told, and it is claimed that inasmuch as the wife has the title to the farm, and is not legally bound to support her husband, the appellant is within the terms of the statute.

There is some little evidence which tends to show that the title to this farm was put in the name of the wife for ulterior purposes. Whether this is true or not is of but little matter. The act of Feburay 13, 1855, passed by the legislature of the State of Michigan, gives the wife the right to hold property and to convey said property free from interference or joinder by her husband (section 6295, How., An. Stat. of Mich.). There is nothing, however, in the statutes of Michigan which deprives the husband of the enjoyment of the use of said real estate or of the right to live thereupon and obtain his maintenance therefrom the same as he might under the common law. He can not interfere with his wife's disposal of her real estate; but so long as the wife of this appellant makes her home upon this farm, by reason of her title thereto, just so long has this appellant the right to live upon the same piece of property, enjoy its use, and obtain his maintenance therefrom.

It is contended in the appeal that the property is not productive enough to render the appellant and his wife a support; such a contention, however, is not true so far as the evidence in the case is concerned, and the appellant admits that if he has been in need of a comfortable living he has not known it.

It is true that the wife is not, in a technical sense, bound to contribute to the support of her husband. Nevertheless, if the wife has not alienated her estate, but lives thereon and obtains her support therefrom, her husband has the common law right to also live upon said real estate and obtain his support therefrom. (Snyder *v.* People, 26 Mich., 108.)

It having been shown that this appellant is not without means of support other than his own labor or the contributions of others not legally bound for such support, he is not within the statute.

Action affirmed.

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RERATING—RATE—DISABILITY—EVIDENCE.

ALONZO C. VEALE (WIDOW COMPLETING).

Title to rerating becomes clear only when it appears manifest from the evidence in the case that the action of the Bureau was the result of mistake of law or fact, but adjudications long since made by officers of the Government fairly using their discretionary judgment, within its proper scope, should not be disturbed for light and transient causes; and in this case, thirty years having elasped since first allowance of pension, and increase under many examinations, the rates fixed will not be disturbed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 12, 1901.

Alonzo C. Veale, late private, Company D, Sixty-second Illinois Volunteer Infantry, filed a declaration for rerating his pension under the general law December 3, 1896, alleging that the ratings granted him from the first allowance to the last were not commensurate with the degree of disability from pensioned causes. This claim was rejected October 1, 1898, on the ground that there was no apparent injustice in former ratings.

November 30, 1898, the claimant, by his attorney, filed an appeal from the above action of rejection, alleging as grounds therefor that an injustice had been done the claimant in the ratings that had been given him. In the appeal the attorney complains that an increase claim filed October 7, 1898, was rejected by letter to him under date of October 12, 1898, without examination. It is true a letter from the Bureau was written the attorney on the date named, stating that the increase claim was rejected on the ground that the rate of $17 was commensurate, etc. This was clearly an inadvertence on the part of the Bureau, because the increase claim filed as aforesaid has never been adjudicated, and no judgment has been rendered thereon. It was pending at the date of the death of the soldier, and when the Bureau ordered an examination thereunder the order was received by the board of surgeons after the decease aforesaid.

Therefore this appeal raises the question of the adequacy of the ratings given the soldier to his degree of disability from pensioned causes since his first allowance, February 19, 1866.

The soldier was pensioned at $2 per month from February 19, 1866, for headache, result of sunstroke; a reissue was granted to include chronic diarrhea and resulting anæmia at $4 from February 19, 1866; $6 from September 5, 1883; increased to $8 from November 23, 1887; reissue to include rheumatism and resulting disease of heart and disease of mouth, result of scurvy, at $16, from January 23, 1889, and $17 from October 4, 1896.

It will be observed that the attorney in his appeal declared that claimant (soldier) was entitled to the grade rate of $24 and a proportionate increase of all ratings given.

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Thirty years after the first allowance of pension comes this appellant asking for a disturbance of ratings made during the whole of that period and under many examinations. Under the decisions of the Department his title to such rerating becomes clear when it appears manifest from the evidence in the case that the action of the Bureau was the result of mistake of law or fact, but adjudications long since made by officers of the Government fairly using their discretionary judgment, within its proper scope, should not be disturbed for light and transient causes. Andrew Stranahan (5 P. D., 199); Jackson Martin (7 P. D., 265); Harrison H. Mason (4 P. D., 244).

It must appear from the face of the medical certificates, made at the time, that the ratings given were manifestly inadequate to the degree of disability objectively shown by such certificates before the ratings thereunder should be disturbed. Affidavits of laymen, and even of medical men, made long after the date of the certificates which were the foundation of the ratings given, clearly should not be heard in impeachment of them. To allow this would be to transcend all those principles of evidence which experience and legal acumen have dictated, and place the uncertainties and treacheries of memory on a higher plane than the writen records of sworn officers.

A careful examination of the medical certificates in this case, read in the light thrown on them by the lay and medical testimony in the record, fails to show any injustice to the legal or equitable rights of the soldier.

The first medical certificate in 1881 discloses no apparent disability above one-fourth, or a $2 rate; the second, in 1883, gave him one-half total disability, or $6; that of 1885 objectively shows no disability except anæmia; that of 1887 gives a $6 rate from all causes, and the objective conditions disclosed do not seem to warrant that rating; in the fall of 1887 another board finds a $12 rating with but few described objective conditions; in 1889 the board gives a $12 rating from all causes; in 1891 a board finds but an $8 rating from pensioned disabilities after an apparently most thorough examination; the examination of 1894 does not disclose objective conditions that seem to warrant a rate higher than was granted; the last examination, in 1896, apparently ordered as a result of the claim for rerating, does not show disability in excess of a $17 rate from pensioned causes.

The above is, in brief, the record evidence in the case aside from a large number of affidavits filed at different dates. There is certainly nothing appearing on the face of these certificates that indicate in any degree that the Bureau acted under a mistake of law or fact. It acted within the scope of its authority and seems to have exercised wisely and fairly the discretion vested in it, and under the law and decisions of the Department the action appealed from should be, and is hereby, affirmed.

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EVIDENCE—DEATH CAUSE—ATTENDING PHYSICIAN.

MARGARET LALONE (WIDOW).

It is contended in a motion for the reconsideration of departmental decision of August 11, 1900, in the case at bar, that the rules laid down in the case of the widow of Charles F. Brown (3 P. D., 92), and in the case of Minnie Shuttleworth (3 P. D., 50), respectively, should govern in this case.

Held: That in the rules laid down in the cases cited—to the effect that the medical referee's opinion must "have some evidence to support it, and some facts proven upon which to base it," before it can be accepted in preference to "the diagnosis made and the opinion expressed" by the attending physician of a soldier in his last illness as to the actual cause of the latter's death—it was not the intention of the Department to place any restrictions upon the official acts of the medical officers of the Bureau which should not equally apply to the medical evidence filed in such cases, and that inasmuch as no other good or sufficient reason is shown why former departmental action in the premises should be receded from the pending motion in the case is overruled.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 9, 1901.

On September 28, 1900, a motion for the reconsideration of departmental decision of August 11, 1900, in the claim for pension under the general law of Margaret, widow of Joseph Lalone, formerly a private in Company A, First Wisconsin Heavy Artillery, which decision affirmed the rejection of said claim by the Bureau, was filed at this Department by the attorneys for the claimant.

As was stated in such departmental decision, the rejection by the Bureau of the widow's said claim was affirmed on the ground that—

The soldier's death from uræmia, consecutive upon hypertrophy of the prostate gland and resulting cystitis—from retention of urine—can not be accepted as due to malarial fever of record, or as otherwise due to the military service.

The pending motion for the reconsideration of the said decision is based on the ground of the following alleged "specific errors:"

1. Error in the premises set up in the opinion of the medical referee, on which opinion the rejection of this claim is based, and resulting error in the deduction drawn from such premises.

2. Error of fact in holding that the partial paralysis of the abdominal muscles, from which the record shows soldier to have suffered, was not a factor in the fatal result.

3. Error of law in the rejection of said claim.

Accompanying the said motion, and in support thereof, is a brief of the attorneys for the appellant, wherein the material points presented for consideration in the premises are quite fully set forth, and in which it is argued that under the rule laid down in the case of the widow of Charles F. Brown (3 P. D., 92) that—

The diagnosis made and the opinion expressed by the surgeons who attended and treated the soldier in his last illness are accepted in preference to the theory of the medical referee as conclusive evidence showing the cause of the soldier's death—

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the appellant's said claim should be allowed upon the testimony of the medical attendant of her late husband to the effect that owing to "the paralyzed condition of the abdominal muscles" of the decedent the function of micturition was interfered with, thereby causing retention of urine, with resulting cystitis, followed by uræmic poison and death. This argument is, apparently, based upon the theory of the said attorneys that the said alleged "paralyzed condition" of the soldier's abdominal muscles was a result of the right hemiplegia for which he was at one time pensioned under the general law, but which pension was afterwards made to terminate by reason of certain facts having been brought to light which, in the judgment of the Bureau, showed that the soldier had erroneously been pensioned for said paralysis of right side.

It is also argued by the attorneys for the appellant that—

* * * under the practice of the Department it has been repeatedly held that where the cause of service origin contributes in any degree to the fatal result, the widow of the soldier is entitled to a pension;

and the rule laid down in the case of Alma Niedhammer (8 P. D., 276) is invoked in the premises.

* * * As to the soldier's title to a pension for paralysis of right side from malaria for which he was granted second grade rating ($30 per month) it must be admitted, from an examination of the record in this case, in connection with the decision of the Supreme Court of the United States rendered November 30, 1896, that as the Government pensioned the soldier for paralysis, the result of malaria, contracted in the service, and then alleged that such paralysis was not due to such cause, and endeavored to establish the contrary and failed in its proof; and the Supreme Court having held that it had so failed, such question is res adjudicata. This being true, * * * it having been settled that the soldier's paralysis was the result of the disease contracted by him during his military service, and he having died therefrom, his widow was clearly entitled to a pension.

Relative to the aforesaid argument or contention, that the allowance of this appellant's claim upon the testimony of the medical attendant of the soldier during the latter's fatal illness is warranted under the rule laid down in the case of the widow of Charles F. Brown (3 P. D., 92), it is noted that although the said physician testified that the soldier's "abdominal muscles were partially paralyzed," he also said that he was "unable to state" whether or not "there was any connection between the paralysis of right side and the partial paralysis of abdominal muscles." In this connection it is deemed proper to state that "the muscles of the trunk are very slightly affected in hemiplegia, although in the early stages some disturbance may be noticed." (Dana.) "This," says the same authority—

is due to the physiological law that all muscles which act synchronously upon symmetrical parts are innervated by each side of the brain. Thus the respiratory muscles of the chest and abdomen are innervated on each side by centers in each half of the brain, and when the center in one cerebral hemisphere is destroyed the function is assumed by the center on the other side.

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Osler says:

Certain muscles escape in hemiplegia, particularly those associated in symmetrical movements, as the thoracic and abdominal muscles.

Neither, as a rule, are the sphincters—either vesical or rectal—of a hemiplegic involved in any way in the paralysis.

Furthermore, when either of the said sphincters is involved in a case of paralysis, as may occur in paralysis due to a lesion of the spinal cord, there is incontinence rather than retention of the urine or of the feces, as the case may be.

That the contraction of the abdominal muscles does, to a certain extent, assist in the expulsion of the urine from the bladder can not be denied; but, as shown in the advisory opinion of the medical referee, dated July 12, 1900, upon this point, the action of the said muscles is merely an accessory and not an essential feature in the act of micturition. And, as tending to show the unimportant part played by the said muscles in the function of micturition, it is safe to state that the firm contraction of the same, even in their normal state, would not be sufficient to overcome an obstruction at the neck of the bladder caused by a greatly enlarged prostate with retention of urine, and in which event it would become necessary to use a catheter or other artificial means to empty said viscus.

As a matter of fact, however, there is nothing in the case going to show the existence at any time of any form of paralysis of the soldier's abdominal muscles, except the mere statement of his attending physician that there was a "partial paralysis" of these muscles prior to his death, although he (the affiant) was unable to state whether or not such condition was due to the right hemiplegia, for which the decedent had been at one time pensioned under the general law.

In view of the facts above set forth it must be held that the aforesaid argument of the attorneys in the case to the effect that the rule laid down in the case of Charles F. Brown (3 P. D., 92) applies equally to the case at bar, is wholly untenable. And, for the same reasons, the argument or contention that the rule laid down in the cases of Mary A. Cox (3 P. D., 313), and Alma Niedhammer (8 P. D., 276), and in analogous cases, should govern in this case, is equally untenable.

In referring to the aforesaid advisory opinion of the medical referee, in the premises, the attorneys state that—

* * * such opinion is properly the subject of analysis and full consideration of the reasons given therein for the conclusions reached.

And, in this connection, cite the rule laid down in the case of Minnie Shuttleworth (3 P. D., 50) that—

While the opinion of the medical referee is justly entitled to great weight in determining questions of a medical character in a pension claim, such opinion should have some evidence to support it, and some facts proven upon which to base it before it should be so entitled or be permitted to control.

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As in the rule in the case just cited, the medical referee's opinion must "have some evidence to support it, and some facts proven upon which to base it," before it can be allowed to control; so, also, was it the intent of the Department in the rule promulgated in the Brown case, hereinbefore cited, and in analogous cases, that certain restrictions and requirements were to be put upon "the diagnosis made and the opinion expressed" by the attending physician of a soldier in his last illness as to the actual cause of the latter's death, and that such restrictions and requirements were to be complied with or fulfilled before such diagnosis and opinion would be accepted as conclusive evidence as to said death cause.

The superior value of a medical diagnosis and opinion that is based upon actual conditions manifested before the observer, rather than one formulated upon theory or speculation as to probabilities, is fully recognized and appreciated by this Department; but to hedge around the official acts of the medical referee with a "Chinese wall" on the one hand, and then leave the gates wide open, on the other hand, for the admission, and acceptance as final, of the arbitrary and unsupported professional opinion or theory advanced by the attending physician of a soldier, would be manifestly inconsistent, and improper as well. Especially is this true when, as not infrequently happens, the testimony of several physicians is filed in a given case, and it is discovered that no two of them describe the same objective conditions, diagnosticate the same cause of disability, or express the same opinion about any essential feature of the case; and, also, that at times either a part or all of the said testimony is in direct conflict with well-established laws of physiology and pathology.

Inasmuch, however, as the argument of the attorneys upon this point was predicated upon what seemed to be—from their standpoint—valuable medical evidence, and in line with the rules cited by them, notwithstanding its real inherent weakness and incompetency, as herein demonstrated, there appears to have been more or less justification on their part for the contentions set up, the error of which should now be apparent.

And that the final argument of the aforesaid attorneys in the premises to be considered is error, is clearly shown by the record in the case. It is contended in the pending motion for reconsideration of former departmental action in the case that inasmuch as the Supreme Court of the United States rendered a decision on November 30, 1896, in which it was "settled that the soldier's paralysis was the result of disease contracted by him during his military service," that "such question is res adjudicata;" and it is then contended that "he having died therefrom his widow is entitled to a pension."

A similar contention was set up in the appeal filed February 8, 1900, by the said attorneys in the case, and in passing upon the same it was

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stated in former departmental decision, of which a copy was furnished the appellant, that—

The case was appealed to the Supreme Court of the United States, and in a decision rendered October, 1896, delivered by Mr. Justice Peckham, it was held that the evidence in the case failed to sustain the contention of the Government that fraud had been committed. The court did not decide that the paralysis was a result of malaria or of his military service, although it is contended in the appeal that the opinion of the Supreme Court was to the effect that the paralysis with which the soldier suffered was due to his military service; and that an opinion from such high authority should control the Department in disposing of the claim.

The opinion of the Supreme Court referred to was delivered November 30, 1896, by Mr. Justice Peckham at the October term of said court, in consequence of an appeal taken to that tribunal by the soldier from a decision of the circuit court of the United States for the eastern district of Wisconsin, in a suit in equity brought by the United States to recover back all moneys paid the defendant in said suit upon the granting of his application for a pension on account of right hemiplegia, alleged to have been of service origin, which decision had sustained the contention of the Government that the said pension had been obtained through the fraudulent acts and representations of the defendant.

The ground upon which the Government sought to recover the amount paid the soldier on his certificate of pension was that the cause of disability upon which he had been granted such pension, namely, paralysis of right side, was due to and resulted from an accident incurred subsequent to the date of his discharge from the Army; and, therefore, that his concealment of the incurrence of such accident and its results, and allegation that his paralysis of right side was due to his military service constituted a fraud.

Inasmuch as the said suit in equity was decided in favor of the United States, the injunction prayed for by the Government being granted, and the soldier's name being dropped from the rolls, he took his aforesaid appeal to the Supreme Court; but the only question decided by the latter tribunal was the one of alleged fraud on the part of the appellant in securing a pension in the manner stated, which question involved the alleged right of the Government to recover the amount theretofore paid the pensioner, but did not affect his alleged title to a pension.

The decision of the lower court that the Government did have such alleged right to recover all moneys paid the appellant was reversed by the higher court on the ground that the evidence in the case upon which the charge of fraud was based was not sufficiently "clear and satisfactory." And it was held that—

A mere preponderance of evidence which at the same time is vague and ambiguous, is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding.

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It is true that the evidence in the case relative to the variously alleged originating causes of the paralysis for which the soldier had originally been granted a pension was discussed at some length in the aforesaid decision of the Supreme Court in the premises, but it is also true that the said court did not undertake to determine whether the said paralysis was due to the appellant's military service, as he claims, or to the accident which he is shown to have incurred subsequent to his discharge from such service, as is asserted by the Bureau.

The following and concluding paragraph of the said decision shows this fact quite clearly:

> It may be somewhat doubtful as to what was the immediate cause of the paralysis from which the defendant suffered and from which he is now suffering and probably will suffer to the end. That he is almost completely helpless and has been all these years is not doubted. The trial court, in the opinion delivered by it, only went so far as to say that on the whole that it was satisfied that the Government had a preponderance of evidence that the pension was obtained fraudulently and the money paid on it should be recovered back. This mere preponderance, as we have seen, is not sufficient in such a case. The decree of the Government must, therefore, be reversed and the case remanded to the circuit court with directions to dismiss the bill.

Furthermore, if the Supreme Court had decided that the evidence in the case established the service origin of the said paralysis, it would have been incumbent upon the Bureau to have restored the soldier's name to the pension rolls, under the general law, for such cause of disability, but no such action was ever taken, and the aforesaid action of dropping the pensioner's name from the rolls has never been overruled, so that, as the case now stands, there is no legal approval for right hemiplegia as of service origin. Had the soldier's name been restored to the rolls under the general law for said cause of disability, it would, however, have been of benefit only to the pensioner himself, and would serve no good purpose in the widow's claim, for, as above shown, no connection whatever between the said paralysis of right side and the uræmic poisoning which caused the soldier's death could possibly have taken place in the manner alleged.

The questions raised in this case by the attorney for the appellant have been thus discussed at some length in order that it might be made apparent to all concerned that the contentions set up were not well founded in fact and that no injustice was done in the premises.

For the reasons herein stated former departmental decision in the case is hereby adhered to, and the motion for the reconsideration and reversal of the same is overruled.

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PATHOLOGICAL SEQUENCE—CAUSE OF DISABILITY.

GEORGE W. MOWERY.

The certificate of medical examination shows the condition of appellant's eyes, on account of which he claims a pension, is due to congenital refractive errors and not to his military service, and that the rejection of his claim under the general law was therefore correct.

Action affirmed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 13, 1901.

This appellant, George W. Mowery, late private of Ninth Battery Wisconsin Volunteer Light Artillery, was pensioned under the act of June 27, 1890, at $6 per month for disease of eyes, neuralgia of head, and pharyngitis. His name was dropped from the rolls by the action of the board of revision, after due notice, on April 15, 1895, on the ground that he was not ratably disabled for earning a support by manual labor under said act.

In October, 1897, he filed a claim under the general law, and alleged that he was disabled by disease of eyes, which he had contracted during his military service. This claim was rejected on August 21, 1899, on the ground that there was no ratable disability from disease of eyes after excluding refractive errors not due to the service.

The appellant, by his attorney, filed an appeal from this action on December 11, 1899, and alleged that it was erroneous, because he is disabled from any kind of labor which requires close application of sight.

The appellant was examined by a specialist of the Bureau on April 16, 1898, whom he told that he was a printer by trade, and was able to perform but little work because of his impaired vision.

The surgeon found on examination that there was congenital hypermetropia, astigmatism of the right eye, with fifteen-seventieths vision uncorrected, but when corrected by the proper glass the vision was fifteen-twentieths; that in the left eye there was congenital hypermetropia with fifteen-seventieths vision uncorrected, but when corrected by the use of a + 2.25 diopter spherical lens the vision was fifteen-twentieths, which shows that after correction of the congenital refractive errors the vision in each eye was practically normal. There was no disease of the internal structures of the eyes, but the conjunctivæ were reddened and slightly inflamed and tender from eye-strain, because of the attempt to use his eyes without having the errors of refraction corrected by the aid of the proper glasses.

Hypermetropia is due, in the majority of cases, to antero-posterior shortening of the eyeball; it may be caused also by flattening of the

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curvature of the cornea or of the crystaline lens. These causes are congenital, and the errors of refraction due to them may not cause much annoyance early in life, when the powers of accommodation are greater than they are in later years; so that they may not cause much inconvenience until that period of life is reached when from senile changes in the eyes the hypermetropia is greatly increased and the power of accommodation is lost.

Astigmatism is due to inequality of curvature of the cornea or crystaline lens, usually of the former, so that the rays of light proceeding from a single point do not, after refraction, tend to meet at a single point on the retina, so that, as a result, the images thrown thereon are blurred and indistinct, and also arises from congenital causes. In this case the appellant did not allege impaired vision as due to the service until 1897, when he was 55 years of age and was feeling the effects of age, in increasing his hypermetropia and in diminishing or destroying his power of accommodation, and the effect of trying to use his eyes in his occupation as a compositor and copyholder in a printing office, under these circumstances, has caused eye strain, as shown by the injection of the conjunctivæ and the general sensitiveness of the eyes when he attempts to use them without the aid of the proper lenses.

After careful consideration of the facts in the case it is believed that the action rejecting appellant's claim for pension under the general law, for the reasons stated, was correct and it is accordingly affirmed.

REIMBURSEMENT—FRAUD AND MISTAKE—EVIDENCE.

JOSEPH B. WILSON.

While it is evident that the allowance which it is proposed to recover was due to a clerical error, yet as, from an examination of the evidence, it is doubtful whether the pensioner was not justly entitled to what he received, it is held that recovery by withholding current pension should not be enforced.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 13, 1901.

This is an appeal from the action of the Pension Bureau in withholding current pension for the purpose of reimbursing the Government for an overpayment alleged to have been due to clerical error. The facts are as follows:

The appellant, Joseph B. Wilson, enlisted as a private in Company G, Seventh Iowa Infantry, on July 24, 1861, and was discharged on March 17, 1862. He again enlisted as a private in Company B, Twenty-eighth Iowa Infantry, on July 24, 1862; was mustered in as second lieutenant of said company to date October 10, 1862, and as captain to date September 1, 1863, and was finally mustered out with

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the company on July 31, 1865. He filed his original application for pension on April 19, 1879, basing the same on "injury of the right wrist, right shoulder, and side," alleged to have been caused by being thrown from his horse while on detailed duty in charge of the brigade ambulance corps, near Helena, Ark., on or about February 10, 1863.

In December, 1884, he was granted a pension of $7.50 per month (one-half the "total" pension of a second lieutenant), commencing from August 1, 1865, on account of injury of the right wrist, the claim on account of injury of the shoulder having been waived for the time being, and that on account of injury of the side having been abandoned. The pension for injury of wrist was subsequently increased to $11.25 (three-fourths of "total"), from March 11, 1885. In April, 1892, he was adjudged to be entitled to additional pension on account of injury of the right shoulder, and a certificate was issued including that disability and allowing him $11.50 per month (in lieu of $7.50), from August 1, 1865, to March 11, 1885, and $15 (in lieu of $11.25) thereafter. These rates were allowed upon the understanding that the disability of the right shoulder was incurred while he was a second lieutenant. He was subsequently informed that said action was erroneous, the fact being that at the time the injury of the shoulder was incurred he was a private, and that his pension would, accordingly, be reduced, and he would be required to refund the amount of the overpayment. In the meantime he had filed a claim for additional pension on account of deafness. This claim was allowed in July, 1900, and on July 27, 1900, a certificate was issued granting him, in lieu of former pension, the following rates: $2 per month from March 18, 1862; $9.50 per month from August 1, 1865; $13.25 per month from March 11, 1885; $19.25 per month from April 1, 1899; and providing that from this allowance there should be recovered, on account of erroneous overpayment, $2 per month from August 1, 1865, to March 11, 1885, and $1.75 per month from March 11, 1885, to March 31, 1899. It appears that the repayment of these amounts will absorb the entire pension until October 4, 1903. From that action the pensioner appeals, contending that the case is not one in which recovery is warranted by the law and the rulings of the Department.

The law and the practice as to reimbursement in cases of overpayment or erroneous payment of pension was very carefully and exhaustively reviewed by Assistant Attorney-General Shields in December, 1893, and his opinion, which will be found in the appendix to volume 6 of the Decisions of the Department of the Interior in Appealed Pension Claims, has been accepted by the Department as a guide in all cases in which the question as to the right to reimbursement arises. Briefly stated, the conclusions of the Assistant Attorney-General were that where there has been fraud on the part of a pensioner, or where

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there has been a mistake of fact in the adjudication of a pension claim, which results in the overpayment of money as pension, in such case the Government may reimburse itself by withholding the accruing pension until the amount overpaid is made good; but that where money has been paid out on an erroneous judgment in the application of the law, the facts all being present, there can be no recovery.

It is not asserted that there has been any fraud on the part of the pensioner in this case. He alleged in his original application and has ever since maintained that his right shoulder was injured at the same time he incurred the injury of his right wrist, in February, 1863, and that the injury then received was the cause of all disability of the shoulder now existing. He admits that the same shoulder was dislocated while he was serving as a private in Company G, Seventh Iowa Infantry, in December, 1861, but says he fully recovered from that injury in about two weeks, and was sound in all respects when he reenlisted in July, 1862. Whatever the truth may be as to that, the Bureau had all the facts relative to the original injury before it when it adjudicated the claim that it now has, and therefore can not say that the allowance was due to misrepresentation or concealment of any material fact on the part of the claimant.

Was the erroneous payment due to "a mistake of fact?"

The reviewer who approved the claim based on injury of the right shoulder made his approval in the following language:

> Approved for injury of right shoulder (new dis.) commencing August 1, 1865; incurred while a pvt.

This approval was concurred in by the re-reviewer. These two officers were charged with the duty of passing upon all legal questions involved in the adjudication of the claim, and their decision as to the pensionable rank of the claimant was binding upon the medical officers whose duty was to make the rating, and upon the officials technically known as "raters," whose duty it was to translate such rating into its equivalent in dollars and cents.

The action of the medical officers was noted on the "brief" in the following terms: "Injury of right shoulder, four-eighteenths (one-fourth). Combined rate not to exceed total of rank."

The use of the fraction one-fourth indicates that the medical reviewer supposed the claimant was to be rated as a second lieutenant and that his intention was to allow him one-fourth (approximately) of the "total" pension provided by law for an officer of that rank. Either he overlooked the statement of the legal reviewer that the disability was "incurred while a private" or he mistook the abbreviation "pvt." for "Lt." The error was carried forward by the "rater" in filling in the amount of pension to be paid.

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In view of the foregoing facts there can be no doubt that the allowance of $4 per month, for injury of the right shoulder, from August 1, 1865, to March 11, 1885, and $3.75 per month thereafter, was due to a clerical error.

So far as that goes, there there can be no question as to the propriety of the action appealed from, and if it were admitted by the appellant that his disability was, as a matter of fact, incurred while he was a private, the Department would have nothing further to do except to affirm said action. He does not admit that, however. On the contrary, he has repeatedly asserted that he made a complete recovery from the injury incurred as a private and that his present disability is due to a subsequent injury of the same shoulder incurred while a second lieutenant.

While he does not specifically make that assertion in his appeal, it is deemed proper to examine the evidence relating to the origin of the disability; for even admitting that the allowance which it is proposed to recover was directly due to a clerical error, or "mistake of fact," yet, if it was not also clearly contrary to and inconsistent with the evidence, there would not, in the opinion of the Department, be a proper case for the recovery of such allowance by the withholding of current pension. In other words, in order to justify recovery (in the absence of fraud) it should appear that the pensioner not only secured pension by reason of a clerical error, but that he was manifestly not entitled to such pension under the law and the evidence.

The appellant admits that his right shoulder was dislocated by a fall in December, 1861, but declares that he was off duty by reason of that injury only two weeks; that he made a complete recovery, and that there was nothing the matter with the shoulder when he reenlisted a few months later. These statements are not fully borne out by the records of the War Department, which show that the disability from said injury was so severe and prolonged as to occasion his discharge from service nearly three months after its incurrence, his "Final statement," furnished by the Second Auditor of the Treasury Department, also showing that he was—

* * * discharged by reason of luxation of the shoulder joint, caused by an injury received at Benton Barracks in the month of December, 1861; on account of the same is unfit for duty and has been since said time.

There is no record of the injuries alleged to have been received in February, 1863, and there was no eyewitness of the accident which is said to have caused them.

Dr. W. H. Vest, the regimental surgeon, in an affidavit filed April 10, 1888, testifies to dressing the appellant's injuries at the regimental hospital soon after their incurrence, and says the right humerus and right wrist were dislocated—the head of the humerus was thrown down

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into the axilla, and the scapula, affiant thought, was thrown a little forward.

Dr. David Stewart, the assistant surgeon, testified, in an affidavit filed August 8, 1884, that he remembered dressing the appellant's arm the second time it was dressed, and that he then told him he was going to have "a bad arm or wrist." In an affidavit filed March 31, 1887, he says:

> I remember of dressing his wrist, as it was very badly swollen and painful to him. I also remember that he said he was badly injured in the shoulder, but I am not able at this late date to say that I examined it.

Samuel J. Ketcham, then sergeant of the appellant's company and subsequently its second lieutenant, testifies that he (appellant) received "a very severe injury of the right wrist joint" at the time and place alleged, but makes no mention of any injury of the shoulder.

James Coats, a member of the company, says the appellant received a severe injury of the right shoulder and wrist and was compelled to carry the injured arm in a sling for several weeks, but does not give any further particulars.

H. R. Crenshaw has testified that the wrist and shoulder were both injured, but in reply to a letter in August, 1884, he wrote: "I witnessed the surgeon dress the injury. I noticed that the injury was located in right wrist," making no mention of any injury of the shoulder. In his deposition before a special examiner in March, 1900, he testifies to the wrist injury, and says: "I think it hurt his shoulder also."

E. G. Marcellus and F. M. Fields, who appear to have been the first persons to reach the appellant after he was thrown from his horse, and who helped him to camp and saw the surgeon dress his arm and place it in a sling, testified in their original affidavit (filed in August, 1884) only to an injury of the wrist; and in replying to letters asking them to give all the particulars, including the nature and location of the injury, they still failed to say anything about the shoulder. In 1887, however, Fields signed an affidavit stating that there was a severe injury of the right shoulder, and making no mention of any wrist injury.

N. C. Martin (affidavit filed in April, 1888) testifies to injury of the right shoulder and wrist, but gives no details.

J. H. Mitchell testifies before a special examiner in March, 1900, that the appellant was thrown from his horse at Helena, Ark., and injured in one wrist.

(It should be said that the special examination was made with reference to deafness and an alleged gunshot wound of the left foot, and such testimony as was given in regard to other disabilities was merely incidental.)

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A pension surgeon who examined the appellant on January 16, 1884, reported:

Injury to right shoulder is claimed to have occurred February 4, 1863, at Helena, Ark. Present physical signs are an apparent thickening of the articular cartilage of right acromio-clavicular articulation and a depression of right shoulder one-fourth inch, which denotes at least partial dislocation of said articulation at time of original injury, and does not now impair the usefulness of said shoulder for ordinary uses sufficient for rating.

A board of three surgeons on March 11, 1885, reported: "Shoulder joint shows no present physical signs of injury."

Two surgeons who made an examination on April 21, 1886, certified that the head of the right scapula was displaced downward and forward—"tilted forward"—one-half inch and the inferior angle elevated to the same extent; also, that there were inflammatory deposits in the acromio-clavicular articulation. This is in substantial accord with the reports of later examinations.

The record of the first injury shows dislocation and nothing more. We must believe that he had not fully recovered the use of the arm when he was discharged in March, 1862, and that the surgeon who recommended his discharge did not think recovery at an early date probable. On the other hand, it must be presumed, in the absence of evidence to the contrary, that he was sound when he reenlisted in July, 1862. He reenlisted as a private, and there is nothing in the evidence to indicate that he was in any way disabled for the performance of duty as such, which would, of course, require more or less use every day of his right arm and shoulder. The evidence all goes to show that he was apparently free from disability of either arm from the date of reenlistment up to the time he was thrown from his horse in February, 1863. The injury (dislocation) received in the first service was not of a character that would necessarily entail permanent disability; on the contrary, the chances would be in favor of complete recovery.

The nature of the injury to the right shoulder sustained in the second service is not satisfactorily shown. In fact, with the exception of Dr. Vest, the regimental surgeon, the witnesses do not seem to have any very clear or positive recollection that the shoulder was injured. The wrist hurt was evidently the more severe. Dr. Vest says there was a dislocation of the humerus.

While the evidence is not all that could be desired it appears to sustain the allegation that there was an injury of the right shoulder in February, 1863. It is, of course, impossible to determine, at this date, whether the slight disability shown by the medical examinations is a result of the first injury or of the second. In view, however, of

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the facts tending to show a complete recovery from the first injury it would seem not unreasonable to hold that it is due to the second injury. At any rate it may be fairly claimed that it is doubtful whether it is due to the injury in 1862 or to the one in 1863. It has been held by the Department that "where a disability which originated prior to enlistment but was apparently cured prior to and at the date of enlistment is revived and aggravated as the immediate result of an accident or of an incident in the line of duty, the injurious consequences of such aggravation may be pensionable under a liberal construction of the law." (James Shaffer, 5 P. D., 6. See also Joseph M. Potter, 3 P. D., 82; Rudolph M. Montgomery, ib., 41; Daniel Daily, 4 P. D., 337, and Stephen Horton, 7 P. D., 369.)

In view of the strictness with which the law hedges about and protects pension once allowed and paid, or accrued (not even permitting it to be withheld to make good a defalcation on the part of the pensioner against the Government), and the undoubted hardship which would often result from the entire stoppage of pension for a considerable time, whereby the intent of the law, which is to provide a present means of support, would be defeated, it is believed that reimbursement by this means should not be enforced in a case of overpayment resulting from a clerical error unless it shall clearly appear, in the light of all the facts, that the pensioner had no right or title whatever to the amount paid him in consequence of such error.

Being, for reasons heretofore stated, unable to find from the evidence in this case that the pensioner was certainly not entitled to be pensioned for the injury of the right shoulder as a second lieutenant, the Department is constrained to hold that the order to withhold payment of pension until a sum equal to the difference between the amount paid on account of said injury and the amount to which he would have been entitled as a private should have accrued was not warranted, and the action is accordingly reversed.

It is not intended by this decision to hold that it was not proper for your Bureau to reduce the rate on account of injury of the shoulder from and after the discovery of the clerical error, nor is it intended to hold that the evidence shows the disability of the shoulder was actually incurred while the appellant held the rank of second lieutenant. The holding goes to this extent only, that, there being a not unreasonable doubt as to whether the disability was not incurred at the time the pensioner alleges, a proper case for reimbursement by the withholding of current pension is not presented.

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DECLARATIONS—AMENDMENTS—ALLEGATIONS.

FELIX MYERS.

A declaration in which the formal parts indicate a claim under the act of June 27, 1890, but which contains allegations of a service not in the war of the rebellion and of disability contracted in said service and line of duty, is subject to amendment and explanation as to any uncertainty in the character of the claim or the claimant's intentions relative thereto.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 13, 1901.

Felix Myers, late of Company I, Nineteenth United States Infantry, filed a declaration for pension August 22, 1890, alleging service from January 24, 1867, to January 24, 1870, and that he contracted typho-malarial fever and results and rheumatism while in said service. This declaration was made on a blank form prepared for a claim under the act of June 27, 1890, as to the formal parts. That is, it was headed with the statement, "Declaration for invalid pension, act of June 27, 1890," but the latter words, "act of June 27, 1890," have been erased with a blue pencil. The body of the paper also contains such statements as these: "Was enrolled * * * in the service of the United States in the war of the rebellion, and served at least ninety days and was *honorably discharged;*" "that said disabilities are not due to his vicious habits, and are to the best of his knowledge and belief permanent;" "that he makes this declaration for the purpose of being placed on the pension roll of the United States under the provisions of the act of June 27, 1890." These formal statements were printed in the blank form, whereas the matters constituting the basis of title—service, disability, etc.—were written in the spaces left for that purpose.

This declaration was jacketed as a claim under the general law, and was treated as such in the calls for evidence. Testimony showing origin in service and continuance of alleged disabilities was filed from time to time and the case was pending for more than ten years as a claim for pension on account of disability contracted in line of duty. When it came to be finally adjudicated, however, it was briefed as a claim under the act of June 27, 1890, and rejected on the ground that claimant's service was not rendered during the war of the rebellion—a fact which was apparent in the first instance, and before any evidence was required or filed.

This action implied, of course, that the claim was not one under the general law, and in a slip attached to the face brief it is declared that said declaration would not be accepted as such a claim. It is presumed, although there is no record of it, that claimant and his attorneys were informed of this conclusion at the time they were notified,

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February 8, 1901, of the rejection of the claim under the act of June 27, 1890, and an appeal has been entered February 23, 1901, contending that the refusal to entertain the claim as under the general law was error. It is pointed out in this appeal that the character of the claim was apparent from the erasure of the words "act of June 27, 1890," on the margin, and from the allegations as to service and disability.

There is force in these contentions, and the facts mentioned, with others hereinbefore noted, were at least sufficient to put the Bureau upon notice that the claim was probably intended to be one for pension under the general law; and since the paper was subject to amendment or explanation in this respect, the claimant should have been afforded the opportunity to declare the intention of the declaration before the adjudication. There is no set and inflexible rule in reference to the forms of declarations or what they shall contain, and, while certain blank forms have been prepared for the purpose of meeting almost all classes of claims and to insure uniformity in the character of the declarations, there is no good reason why any form may not be used provided it contains all averments necessary to meet the requirements of the law.

Certain "instructions" relative to declarations under the act of June 27, 1890, were issued July 28, 1897 (9 P. D., 93). One of these is as follows:

> Should the paper fail to show upon its face, with certainty, that it is intended as a claim for the benefits of the act of June 27, 1890, the claimant may make it certain by means of a supplemental affidavit, which shall be read in connection with and as a part of the original application.

The converse of the rule would make a paper apparently intended for a claim under the general law subject to like explanations. Various decisions have indicated how far declarations may be amended, either to meet the requirements of the law or to explain the intent of the claimant. One of the latest of these is in the case of Alphonso W. Ellis (11 P. D., 93), wherein this language is used:

> The declaration in a pension claim bears a corresponding relation to its case as does the declaration or complaint in a case at law. Such a declaration is good if it substantially sets forth the cause of action in such terms that an issue can be joined, and is sufficiently certain if it can be made certain.
>
> The declaration in the within case is similar to one in a case at law in which a motion would lie to make the allegations more definite and certain. It is not one which would be open to demurrer or which would be stricken out for want of exactness; neither is it one which could be successfully demurred to during trial because the proof—such as has been referred to herein—did not correspond to the allegations.
>
> The true mission of a declaration, whether it be in a case at law or in a pension claim, is that it should state the facts which are the basis of the claim in such language and with such definiteness and clearness that the party against whom the claim is filed be apprised of the demand in terms which may not be mistaken, misinterpreted, or confused.

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In the case under consideration the facts before mentioned, that the service alleged was one that could not give title under the act of June 27, 1890, and that certain disabilities were claimed to have been contracted in service and line of duty, bring it peculiarly within the rules above indicated, and entitle the claimant to file any amendment necessary to show under which law he sought pension if there is doubt on the subject. For this reason the action as taken was erroneous and is reversed. The papers are herewith returned for readjudication of the claim.

RATE—PATHOLOGICAL SEQUENCE—EXAMINING SURGEONS' RATINGS.

ANDREW G. CUNNINGHAM.

The appellant, who is pensioned at the rate of $12 per month for rheumatism and resulting disease of heart, filed a claim for increase, wherein he alleged that varicose veins of both legs had resulted from disease of heart, and claimed that inasmuch as the board of surgeons by which he was examined pursuant to said claim had rated his disabilities at third grade ($24 per month), he was legally entitled to such rate from the date of such examination.

Held: That the existing rate in the case was fully commensurate with the degree of disability found at said examination as a result of rheumatism and disease of heart; that the varicose veins of both legs have not been shown to be a sequence, either from a pathologic or mechanical standpoint, of disease of heart, and that no authority to determine what rate or rates of pension shall or shall not be allowed in any claim, or class of claims, for pension has ever been conferred upon examining surgeons, either by law, rule, or regulation.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 13, 1901.

Andrew G. Cunningham, late private, Company B, Forty-fifth Iowa Infanty, who is a pensioner under the general law on account of rheumatism and resulting disease of heart, filed an appeal March 24, 1900, from the rejection by the Bureau on May 2, 1896, of his claim for increase, filed October 19, 1895, wherein he alleged that varicose veins of both legs had been caused by weak circulation, due to the condition of his heart, and from the action of the Bureau, dated January 30, 1900, in his claims for increase and rerating, respectively, filed July 27, 1897, by which action the rate in the case was increased to $12 per month from April 6, 1898, the date of the medical examination, held pursuant to said claim, but which action failed to take cognizance of the claim for rerating and ignored the claimant's allegations in regard to varicose veins.

The contentions set up by the claimant in such appeal are to the effect that the extent of his disability, in so far as the performance of any special character of manual labor is concerned, "requiring exertion of

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the limbs or muscles of the body, he is almost entirely disabled;" that the "varicose veins cause him constant pain, and so benumb and weaken his legs as to retard and interfere with his walking;" that his present rate of pension "is entirely inadequate to the degree of his pensionable disabilities;" and that the examining surgeons found the varicose veins to be a "result of valvular disease of heart," and so "reported" their findings.

Relative to the aforesaid contentions, the Bureau submitted the following report, dated January 16, 1901:

This is an appeal from the action of May 2, 1896, denying increase and refusing to admit varicose veins as a result of pensioned causes, and from that of January 30, 1900, allowing increase to $12, the claimant contending that "in decision on claim for increase, the disability of varicose veins [was] ignored." He is pensioned under the general law for rheumatism and resulting disease of heart.

All the evidence filed in this case before and since these actions were taken has been carefully considered.

The rejection of increase dated May 2, 1896, was based upon the certificate of examination dated January 29, 1896. The board stated that it could find no evidence of rheumatism, but it found mitral insufficiency of the heart, for which ten-eighteenths was recommended. This was a fair and equitable rate for the condition shown. The certificate of examination, dated April 6, 1898, upon which increase to twelve-eighteenths was allowed, showed some rheumatism, and a well-defined murmur of the heart, with dilatation and dyspnœa, but no œdema or cyanosis. Both certificates showed the veins of each leg to be considerably varicosed, constituting quite a degree of disability. This condition, however, can not from a medical standpoint be accepted as a result of the pensioned causes, there being no pathological connection between the same.

In addition to the facts set out in the foregoing report, it is deemed important to note that the pensioner seems to be under the impression that inasmuch as two members of the board of surgeons by which he was examined January 29, 1896, addressed a letter on June 2, 1897, to the Commissioner of Pensions, in which it was stated that "it was the intention of this board to place him in the third grade, or $24 per month," that such rate should, consequently, have been allowed him. In this connection it seems equally important to note the fact that it is not within the purview of the functions conferred by law upon examining surgeons or boards of examining surgeons to determine what rates should or should not be allowed in any class of claims for pension, the recommendations of such surgeons as to the rates which they may deem proper in any given case being merely advisory in character and in no way binding upon the Commissioner of Pensions, who has full authority to supervise and review their reports and recommendations in all cases, and whose action in any case is subject to revision only by the Secretary of the Interior.

Since filing the appeal now under consideration the appellant has also filed certain medical evidence with a view to showing that he is almost, if not quite, wholly incapacitated for the performance of all

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"hard manual labor" by reason of rheumatism, disease of heart, and varicose veins of both legs. Inasmuch, however, as this evidence relates to the condition of the appellant in 1900, some two years subsequent to the date on which he was last examined by a board of examining surgeons under a claim for increase, the mere fact that such evidence tends to show the existence of a greater degree of disability from pensioned causes than was manifested at the said last official medical examination made of the pensioner has no bearing upon the question at issue in the pending appeal. If the degree of disability due to said pensioned causes has progressed to the extent alleged, it would seem that the appellant's interests would best be subserved by the filing of another application for increase, under which he could again be medically examined, and his alleged title to a higher rate of pension be determined in the light of the findings of the surgeons at such examination. The only attempt made in the aforesaid medical evidence to determine the origin of the varicose veins is the statement of one of the affiants that they were "due to impaired circulation." And the appellant is in error in his contention that the last two boards of surgeons by which he was examined held that his varicose veins were due to his disease of heart. One board merely stated that they were "not due to vicious habits," and the other was equally silent as to their probable source of origin.

Any theory advanced, however, which holds that varix of the lower extremities is a common sequence of "mitral insufficiency," the character of the heart lesion shown to exist in this case, would, in the judgment of the Department, fail of demonstration, as such results are not usually observed clinically in said disease; besides which there are a number of other more usual and probable causes of varix than any form of heart lesion which would first have to be eliminated before the relation of cause and effect between the two conditions could be recognized and admitted.

Therefore, for the reasons stated, it is held that the existing rate in the case was fully commensurate with the degree of disability found as a result of rheumatism and disease of heart at the medical examination held pursuant to the pensioner's claim for increase; that the varix of his lower extremities have not been demonstrated, either from a pathologic or mechanical standpoint, as being a sequence of the disease of heart (mitral incompetency) for which he is pensioned; and that no authority has ever been conferred upon examining surgeons, either by law, ruling, or regulation, to determine what rate or rates of pension shall or shall not be allowed in any claims, or class of claims, for pension.

The actions appealed from are hereby affirmed.

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MARRIAGE—EVIDENCE—PRESUMPTIONS.

ESTHER A. PALMER (WIDOW).

The claimant having proved the fact of her marriage to the soldier according to the law of the State of Illinois, and cohabitated with him as his wife from the marriage to the date of his death, sixteen years afterwards, her pensionable status was established. A mere presumption of life of a prior husband can not prevail against the presumption of the innocence of parties who enter the marriage relation according to legal forms.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 15, 1901.

Esther A., widow of Era W. Palmer, late private, Company G, Nineteenth Wisconsin Volunteer Infantry, filed a declaration for pension under the general law, December 7, 1885, alleging that the soldier's death from lung disease was due to his military service. This claim was rejected November 3, 1898, after special examination, on the ground that the claimant is not the lawful widow of the soldier. From this action the claimant, by her attorneys, appeals to the Department, alleging as grounds that the evidence on file clearly shows that an error was made in the decision; that the widow's first husband had a wife living when he married her, and that the long unexplained absence of the first husband raises the presumption of his death.

There are the claims of three children also involved, but as a decision of the widow's claim will also dispose of them they will not be separately considered.

In order to arrive at the issue involved for the purposes of this opinion, it will be well to first speak of the undisputed facts as disclosed by the record.

The claimant was married to one C. J. Williams at Adel, Iowa, July 22, 1866. Williams lived with claimant until the spring of 1868, when he abandoned her. The claimant then married Era W. Palmer at Rushville, Ill., on December 25, 1868, and lived with him as his wife until his death in 1884.

It will be noted that the only question raised by this appeal is that of the legality of the second marriage of the widow, or in other words, her marriage to the soldier from whose death she claims title to pension.

Under the provisions of the act of August 7, 1882, such marriages as are involved in this case shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of the marriage.

The case of Mary B. McCollum, widow (6 P. D., 93), contains a full quotation from the case of Cartwright et al *v.* McGown (121 Ill., 388) in which the supreme court of the State of Illinois discusses the sub-

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ject of common-law marriages in that State most exhaustively. There is no manner of doubt but that a common-law marriage is recognized in Illinois and that the courts of the State have gone very far to legalize marriages entered into in good faith, no matter whether the provisions of the statute on the subject of marriage have been complied with or not. Coal Run Coal Company *v.* Jones (127 Ill., 379), Johnson *v.* Johnson (114 Ill., 611), Schmisseur *v.* Beatrie (147 Ill., 210).

In the Cartwright case, mentioned above (121 Ill., 388), the supreme court says:

Where both parties are married in the honest belief, founded on apparently good reason, that they are capable of entering into the marriage contract, when in fact one of them is not, if they continue to cohabit as man and wife after the removal of the impediment to their lawful union, the law will presume a common-law marriage by the acts of the parties in the absence of any evidence to prevent such presumption. In such a case there are many strong and cogent reasons for presuming a new marriage after the removal of the impediment even though the parties may not have known of its removal. There the cohabitation, in ignorance of facts rendering it illegal, is not to be regarded as meretricious or criminal until the parties have knowledge of the facts. Their purpose in such a union is honorable marriage, which the law favors, and not mere illicit intercourse.

In the case of Schmisseur *v.* Beatrie (147 Ill., 210) the supreme court lays down the doctrine in this class of cases as follows:

1. A second marriage is void when either of the parties to it has a husband or wife by a former marriage who has never been divorced and is still living.

2. Where a marriage has once been solemnized according to the forms of law every presumption will be indulged in favor of its validity. This presumption is so strong that a former husband or wife will be presumed to be dead after an absence of less than seven years. The ordinary presumption of the continuance of human life is made to give way to the presumption in favor of the innocence of a second marriage.

The second marriage in this case took place, probably, within eight months after the first husband abandoned the claimant. Certainly this was long before any presumption of death from unexplained absence could arise under any set of circumstances, yet there is another question to be considered just here, which is the real issue. That question is: Did the claimant marry the soldier (or her second husband) in good faith, believing she had a right to marry him, or in the language of the supreme court of Illinois, in the Cartwright case (ibid): Did she marry him in the honest belief, founded on apparently good reason, that she was capable of entering into the marriage contract? And, was this second marriage legal?

This is a matter of evidence. The claimant upon this point testifies before the special examiner, as follows:

At the time I married the soldier I thought that Williams was dead or else I would have procured a divorce. * * * No, sir; I never procured any divorce, for I heard he was dead soon after he left me. A man named Kavanaugh, who was freighting on the plains (he is dead), came to Adel, Iowa. He told me that Williams was murdered at Cheyenne or on the Cheyenne; can't say which. He knew Williams

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at Adel, Iowa, and told me that he saw his body and knew him, or else it was someone who looked terribly like him. I never heard anyone else say Williams was dead. I understood from Kavanaugh that he was hung. Don't know for what nor by whom. * * * All I know of Williams' being previously married was what he told Lewis A. Miller and Margaret DeWoody. * * * Williams and I never got along agreeably. He was indolent, and wanted me to make the living for both, and he was too fond of other women.

Margaret DeWoody, a sister of the claimant, testified that after Williams left her sister he was reported dead. At the time of the separation, however, the two sisters were living several hundred miles apart.

James M. Baxter testifies that Williams and the claimant lived on his farm and worked for him, the exact date he could not remember, but he remembered that Williams called on him one morning for some money and did not return. The witness says he received a letter from Williams, dated Council Bluffs, Iowa, in which he said he was on his way West and would not return, and that was the last he ever heard of him. In a few days he gave claimant some money to return to her folks.

Lewis A. Miller testified as follows regarding Williams:

My sister was married to a man named Williams a year or two after the war. Soon after she was married there were two former wives of Williams hunting for him, and he ran away. I heard he was hung by a mob near Salt Lake City, Utah, about two years after he left Esther.

In an affidavit, Mrs. De Woody states that Williams married her sister, the claimant, under an assumed name—his real name was "Don"—and that he had a wife living at the time of his marriage to claimant. This was told the affiant by a sister of Williams. On cross-examination this witness states that it was a "rumor" that Williams was married prior to the marriage to claimant.

This is all the material testimony in the record for the purposes of this inquiry. It is apparent that there is no approach to a legal establishment of a prior marriage by Williams, or that he had an undivorced wife living at the time he married claimant.

That disposes of one of the questions presented by appellant, which may now be discarded as not proven.

There remains the question of the legality of the marriage of the claimant to the soldier in 1868.

There is no doubt but that the marriage of the claimant and soldier was in form fully in conformity with the statutory requirements of the State of Illinois. On its face it was a legal and valid marriage; both parties were of sufficient age and mental capacity; cohabitation and a continuous living together as husband and wife for a period of sixteen years followed.

It is equally true that the prior marriage of the claimant to Williams

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was in due and legal form in accordance with the laws of the State of Iowa.

In the case of Johnson *v.* Johnson (114 Ill., 611), the supreme court of that State cites the case of Senser et al. *v.* Bower et al. (1 Penrose & Watts, Pa., 450), wherein it is said:

> But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the proof being equal the presumption is in favor of innocence. And so far is this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail.

I apprehend that the main difficulty in reaching a proper conclusion in this class of cases has arisen from confounding presumptions with proofs, or, in other words, mingling what are presumptio juris with conclusive presumptions.

In the Johnson case (Ibid.) the supreme court of Illinois says:

> But if the law raises the presumption that the former husband was alive at the date of the last marriage, from the fact that seven years had not then elapsed since the last knowledge of him, it also, in the absence of proof to the contrary, presumes that the parties in contracting such marriage, and in subsequently cohabiting, were innocent of immorality or crime, and that there was no legal impediment to its consummation. When a marriage is shown in fact the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid.

It seems to be the law in Illinois that "in absence of proof to the contrary," a marriage in fact will be presumed to be legal.

There is not a line of testimony in the record in this case that even tends to show that the first husband was alive at the date of the marriage to the soldier. There is a presumption of continuance of life, nothing more. There is evidence tending to show that he was killed or hung shortly after he left the claimant.

In the case of the Coal Run Coal Company *v.* Jones (127 Ill., 379) the Supreme Court says:

> The second marriage being shown in fact, the law raises a strong presumption in favor of its legality, which we do not regard as overcome by mere proof of a prior marriage, and that the first wife had not obtained a divorce.

In paragraph 951, in the first volume of his work on Marriage and Divorce, Mr. Bishop says:

> If, while this presumption of the continued life of an absent party to a marriage remains, the other enters into a second marriage, the presumption of the innocence of such marriage operates as a counter presumption of death. Should it be urged that in natural reason the marriage does not render the death more probable, the reply is that actual belief and presumption are not necessarily identical, yet truly the marriage is an added ground for inferring death. For right-minded men and women, as all are assumed to be, will not knowingly commit polygamy.

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And in paragraph 956 the author sums up in this forceful language:

Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proofs, the law raises a strong presumption of its legality—not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. So that this issue can not be tried like the ordinary ones, which are independent of this special presumption. And the strength of the presumption increases with the lapse of time through which the parties are cohabiting as man and wife. It being for the highest good of the parties, of the children, and of the community that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce.

See, also, Jennette Burton (9 P. D., 31); Louise C. Germain (11 P. D., 66); Minerva Brown (No. 76 Current Series); Mary Coburn (11 P. D., 43).

When the claimant in this case proved as a fact her marriage to the soldier in accordance with the laws of the State of Illinois; and when this marriage was followed by cohabitation for sixteen years, during which period she bore him a large family of children, her pensionable status was established, in the absence of proof that she entered into said marriage while she had a former husband living and undivorced. The mere presumption of life is not sufficient to overcome those presumptions which surround the celebration of a marriage, and this by the vastly greater weight of authority in this country.

What is then to be said of the other view of this case, that the soldier and claimant lived and cohabited together for a period of sixteen years after the marriage? Each year of such life strengthened the presumption that arose at the fact of marriage until what may have been a rebuttable presumption ripened into an almost conclusive one. The special examination began in 1897, thirty-one years after Williams' abandonment of the claimant, and not a witnesss was heard to say that he had ever been heard from since the day of his disappearance in the year 1868.

In the light of the decisions of the Illinois courts, and the broad doctrine of the law obtaining everywhere which favors lawful marriage, and sustains, wherever possible, the innocence of the parties entering that sacred relation, it clearly appears that this claimant is the widow of the soldier.

The action appealed from is accordingly reversed and the papers are herewith returned for action in conformity with this opinion.

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PRACTICE—APPEAL—FEE AND MERIT CLAIM.

JAMES HUGHES (FATHER, CLAIMANT).

T. W. TALLMADGE (ATTORNEY).

The action of the Bureau in a claim for pension upon its merits can not be reviewed upon appeal from action of the Bureau in the matter of fee.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 19, 1901.

T. W. Tallmadge, of Washington, D. C., on January 23, 1901, entered an appeal from the action of the Bureau, in the matter of the fee on the issue of July 9, 1900, in the claim for pension of James Hughes, as dependent father of Patrick Hughes, deceased, who served as first-class fireman on ship *Maine*, United States Navy.

The appellant, in behalf of the claimant, on September 26, 1898, filed a declaration for a dependent parent's pension, "under the provisions of the act of June 27, 1890." He filed, August 31, 1899, articles of agreement stipulating for the payment of a fee of $25 and the evidence which established the claim.

On July 9, 1900, certificate issued to allow to the claimant, as dependent father of Patrick Hughes, deceased, pension under the provisions of the first section of the act of June 27, 1890. On said issue Mr. Tallmadge was certified a fee of $10. Upon appeal he contends for the payment of a fee of $25 under said articles of agreement.

Appellant contends, in substance, that pension should have been allowed under the general law. He cites the decision of this Department in the case of Kathryne A. Ratcliffe (11 P. D., 171), in support of his contention.

In the case of Kathryne A. Ratcliffe, supra, the Department held that—

An applicant for a dependent parent's pension may, if he or she so elects, make and prosecute a claim under the provisions of section 4707, Revised Statutes, without regard to the provisions of section 1, of the act of June 27, 1890.

Also in the case of Kathrina Blitch (11 P. D., 247), the Department held, in substance, that it would be error where a dependent parent's claim is filed and prosecuted under section 4707, Revised Statutes, without invoking the benefits conferred by the 1st section of the act of June 27, 1890, "to issue certificate as under section 4707, Revised Statutes, as amended by section 1, of the act of June 27, 1890."

However, the question presented by this appeal is not whether pension has been allowed under the proper law, but whether the correct fee has been certified to the attorney for his services in securing the

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pension which has been allowed. This question is in no way affected by the fact that a person can prosecute a claim for a dependent parent's pension under the provisions of section 4707, Revised Statutes, without regard to the provisions of section 1, of the act of June 27, 1890, as is held in the case of Ratcliffe, supra, or by the fact that it would be error to issue certificate under the provisions of the act of June 27, 1890, when the claim was filed and prosecuted under the provisions of section 4707, Revised Statutes, as is held in the case of Blatch, supra.

When error is committed in the adjudication of a claim, an appeal will lie to this Department for the correction of the error. However, the action of the Bureau in a claim upon the merits thereof can not be reviewed upon appeal from its action in the matter of fee. For the question presented on the appeal is as to the matter of fee and nothing in addition can be decided. The question as to what fee shall be paid is determined from the record. The record shows what pension has been secured, and the law fixes the amount of fee to be certified to an attorney for his services in securing the particular pension allowed. It is plain, therefore, that only such fee can be certified as the law provides for the pension secured; and, as before said, the record shows what pension has been allowed.

The appellant complains that the proper fee has not been certified to him; for the purpose of supporting his contention for a larger fee than has been certified to him, he declares that pension should have been allowed pursuant to some law other than that under which the claim was approved. But he has taken no steps looking to the correction of the error he declares has been committed; he permits the error to remain uncorrected and takes steps looking to the payment of a fee for services in such claim as he believes should have been allowed by the Bureau.

The rule has been, and in conformity therewith this Department has invariably held, that only such fee shall be paid as the law directs for such pension as has been secured by an attorney for a claimant.

In this case pension has been secured by the appellant under the provisions of the first section of the act of June 27, 1890. One of the plain mandates contained in section 4 of said act is that a fee in excess of $10 can not be paid for prosecuting a claim for pension under the provisions of said act; therefore, a fee in excess of said amount can not be paid for such services. (See case of Sarah O. Stockwell, 10 P. D., 428.) So any contention as to the legality of the Bureau's action in a merit claim with respect to the pension that has been allowed serves no purpose upon appeal from the action of the Bureau, in the matter of fee as an argument to show that the proper fee has not been certified.

It appears that the proper fee has been certified to this appellant for securing an allowance of pension under the act of June 27, 1890; and accordingly, said action is affirmed.

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DISLOYALTY—SECTION 4716 REVISED STATUTES—EVIDENCE—RECORD.

JAMES H. RAINEY.

The record of the War Department showing that claimant, while a prisoner of war in Andersonville, Ga., in February, 1865, was "transferred to Colonel O'Neil, rebel recruiting officer," in the absence of proof showing enlistment in the rebel army or performance of service therein, does not establish the fact that he aided or abetted the late rebellion against the authority of the United States.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 22, 1901.

This appellant, James H. Rainey, was a member, from August 20, 1862, to August 9, 1865, of Companies E and C, Seventh Tennessee Cavalry, and in September, 1891, was allowed pension, certificate No. 664705, under the act of June 27, 1890, but in March, 1895, was dropped from the rolls on the ground that he had voluntarily aided and abetted the rebellion, dropping of pension being made pursuant to a decision by the Department rendered February 24, 1894, affirming rejection in December, 1883, of a claim filed June 29, 1882, under the Revised Statutes, on account of an alleged injury of breast received in the summer of 1863, the rejection and affirmance being based mainly, if not solely, upon the fact, stated of record, that he had been, while a prisoner of war in Andersonville, Ga., in February, 1865, "transferred to Colonel O'Neil, rebel recruiting officer."

The original decision of February 24, 1894, was adhered to September 6, 1894, October 30, 1894, March 23, 1895, and November 15, 1897. The claimant then applied to Congress, and a special act was passed and approved January 15, 1901, directing the Secretary of the Interior to place his name upon the rolls at $12 per month, which has been done.

On February 27, 1901, he filed the present motion for reconsideration, contending that the reports of the Congressional committees in re bill for passage of said special act, and the evidence in the case shows he did not voluntarily enlist in the rebel army or aid or abet the rebellion, and that his pension under the act of June 27, 1890, should be restored from date of dropping.

The records of the War Department show that claimant was captured March 24, 1864, and while a prisoner of war was transferred, as above stated, on February 28, 1865, and was returned to his command April 18, 1865. There is no record showing his enlistment in the Confederate army, and he denies that he ever did, in fact, enlist therein or take any oath of allegiance to the Confederate government, or perform any Confederate service.

He explains the record by saying that when a call for volunteers in the Confederate army was made by the rebel authorities to the prisoners he and others responded with a view solely of thus finding a

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way to escape rather than die from hunger and exposure in the prison. He was sick at the time, he says, but was taken along by his comrades and placed in Ocmulgee Hospital, at Macon, Ga., from which place he made his escape.

Claimant's explanation has not been credited because of the apparent improbability that the Confederate recruiting officer would have accepted a man so sick as to be unable even to march, as claimant states he was, he being carried out, he says, by his comrades and placed on an old car for transportation.

Two comrades corroborate his statement that he and the others with whom he went on "transference" to Colonel O'Neil were induced to do so to escape the rigors of their prison life and to find means also for escaping from the Confederate powers and rejoining their own Union commands.

This case is similar to that of John H. Kimball, 11 P. D., 124, 136, in which the Department held that—

> The record showing the transfer of a Union prisoner to Colonel O'Neil, rebel recruiting officer, will not raise a presumption of an enlistment in the Confederate army, but is sufficient to raise a presumption of aiding and abetting the rebellion.

And the adverse action in that case was reversed upon failure of the proof to show that the soldier, Kimball, did, in fact, either enlist or perform any service in the Confederate army.

So, also, in the present case, there is no evidence tending even to show that this claimant ever enlisted in the Confederate army, or ever performed any service whatever therein, or otherwise did anything whatever to aid or abet the rebellion. He denies, under oath, that he ever took any oath of allegiance to the Confederate government, and there is no evidence, aside from the bare record, tending to show that he did take such an oath or that he performed any service in that army. According to his story he lay the whole time after his transfer and until his escape in the rebel hospital, without performing any service. The mere seeming improbability that they accepted for service a very sick man does not appear to be sufficient ground for refusing all pension to this claimant, who performed nearly two years of faithful, active service and suffered ten months of prison hardships. It may have been considered by the rebel recruiting officers that claimant would quickly recover from his sickness by reason of a change from the prison life and soon be able to enter the rebel ranks pursuant to the volunteer offer.

In the absence of any proof showing his enlistment in the rebel army or performance of any service therein, the holding that he voluntarily aided and abetted the rebellion does not appear to be warranted. Claimant was under Colonel O'Neil less than seven weeks, much less time than was Kimball, and, like Kimball, is not shown to have actually done any service whatever during even that short time.

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I am of the opinion that the evidence fails to establish that claimant voluntarily aided or abetted the rebellion. This motion is, therefore, sustained and the action of March, 1895, dropping claimant from the rolls, is reversed.

The rejection of the claim under the Revised Statutes on the ground that service origin of the alleged disability is not established will stand, that ground of action having been fully considered on the original appeal, and then claimant having made no contention as to the affirmance of such rejection on that ground.

You will readjudicate the claim under the act of June 27, 1890, in accordance with the foregoing.

ORIGIN—DISABILITY—INCUBATION—TYPHOID FEVER.

ANDREW FORBES.

This claim was rejected for the reason that, according to the records of the War Department, the appellant became ill in eight days after his enlistment, and that, according to the evidence filed, his sickness was typhoid fever; and that, according to medical authorities, the period of eight days is too short for the incubation of said disease, which was, therefore, not contracted in the service and consequently any disability arising therefrom is not pensionable.

Held: That the facts in the case show that said record is erroneous as to the date of commencement of the soldier's illness and that the statement of the Bureau relative to the period of incubation of typhoid fever is incorrect.

Action reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 22, 1901.

This appellant, Andrew Forbes, late private of Captain Brown's Independent Company of Pennsylvania Volunteer Militia Cavalry, applied for a pension on July 13, 1889, and alleged that in July, 1863, he contracted typhoid fever, was treated in camp and while convalescing began to be troubled with diarrhea, which has continued to the present time, and soon after his discharge he began to suffer from rheumatism and bronchitis, and later with disease of heart.

This claim, which is numbered 716303, was rejected on April 28, 1896, for the reason that the typhoid fever, which had been alleged as the cause of appellant's disabilities, was not contracted in the service, but was incurred prior to his enlistment, as the records of the War Department show that he was taken sick at Chambersburg, Pa., on June 28, 1863, within eight days after his enlistment and because the period of incubation of typhoid fever is more than eight days.

The attorney of record in the claim filed an appeal from this action on November 17, 1898, and alleged that the action of the Bureau was

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erroneous because appellant was not sick at Chambersburg, Pa., on June 28, 1863; that he was not sick until July 8, 1863; that the Confederate army was in possession of Chambersburg on June 28, 1863, and that he could not have been there at that time unless he had been a prisoner of war, which he was not.

The records of the War Department show that the appellant was enrolled on June 20, 1863, and was mustered out on August 1; 1863; that Captain Brown's company was ordered, on July 8, to leave Harrisburg, Pa., and proceed to Chambersburg, Pa., and that the muster-out rolls of the company, dated August 1, 1863, reported the appellant absent—sick at Chambersburg, Pa., since June 28, 1863.

On December 30, 1889, the attorney filed an affidavit from James C. Forbes, who was a comrade of the appellant, in which he stated that the soldier contracted typhoid fever at Clear Spring, Md., in July, 1863, and that he, the affiant, was detailed to take charge of him in camp. This affidavit and a statement from the attorney, in which he endeavored to show that the record was erroneous, were sent to the War Department with its former report with the inquiry whether, in view of the statements and of the fact that the command did not leave Harrisburg until July 4 (?), 1863, and had not been absent from that city prior to that date, the Department report showing the soldier as absent, sick at Chambersburg, Pa., on June 28, 1863, was not incorrect, and whether the date should not be July 28, 1863. To these inquiries the War Department replied under date of April 22, 1898, that the report of November 29, 1889, which showed the soldier sick at Chambersburg, Pa., since June 28, 1863, was correct.

In 1895, the case was specially examined and the soldier stated to the special examiner that he was with his regiment at Harrisburg, Pa., until July 4, 1863, when they went to Chambersburg, which they reached on the 7th; they remained there for about three days and then went to Falling Water, Md., and from there to Clear Spring in the same State; that he thought that the journey from Harrisburg to Clear Spring, occupied nine days; that he was perfectly well when they arrived at the latter place, but two or three days later he became sick, and when his company returned to Chambersburg, a few days later, he was able to accompany it, but when his company left Chambersburg, which was about July 15, he was unable to travel and was left behind in the care of Dr. Shaw, who was a resident physician of that town, with whom he remained until August 1, 1863, when he had recovered sufficiently so that he could go to Harrisburg, where he was mustered out on the same day.

The statements of the appellant relative to his presence with his company in Harrisburg in July were corroborated by the statements of the captain of his company, who told the special examiner that his company left Harrisburg on the 2d of July and that they were exposed

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to a rain storm soon after their start, and that the appellant was taken sick on the next day and was left in a house near Chambersburg, which place they reached on the 5th or 6th of July.

James C. Forbes, who was a comrade of the appellant, but is not related to him, told the special examiner that he had been acquainted with the appellant before enlistment and tented with him in the service; that he, the appellant, was taken with typhoid fever at Clear Spring, Md., several weeks after enlistment; that he assisted him to return to Chambersburg, Pa., with the company, and that he was detailed to wait on him and did so until the company left Chambersburg to return to Harrisburg, shortly before it was mustered out; that as the appellant was unable to accompany the command he was left behind in the charge of a physician residing in Chambersburg.

Dr. Alexander R. Shaw, of Philadelphia, told the special examiner that he was residing at Chambersburg in 1863, and remembered that he took a soldier, who was sick with typhoid fever, into his house and treated him because he was unable to go with his command; that he never had but one soldier sick in his house, but could not recall whether he treated him before or after July 4, 1863, nor could he remember his name.

It appears from the Chronicles of the War of the Rebellion that the Confederate cavalry, which was the advance guard of General Lee's army in its invasion of Pennsylvania, entered Chambersburg on June 16, 1863, and that on June 23, 1863, said town was reoccupied by the Confederate army in force, which, passing onward, reached Carlisle and Gettysburg on the 26th and captured York on the 27th. On July 1 a body of Union militia, finding that the Confederate forces had withdrawn from Carlisle, took possession of that place but were attacked during the afternoon by the Confederates, and the United States barracks were burned during the cannonade. During the battles of the 1st, 2d, and 3rd of July the Confederate army was concentrated at Gettysburg, and after their defeat retreated through Chambersburg and finally recrossed the Potomac into Virginia on July 13, 1863.

The appellant was residing in Rome, Bradford County, Pa., which is in the northern central part of the State, when he enlisted and went down to Harrisburg to the camp of rendezvous, and was mustered into the service there on the 20th of June. At this time, as has been shown, the cavalry of the enemy had already entered Chambersburg and were followed a few days later by the main army, which pushed its way northward to Carlisle and Gettysburg by the 26th.

As the records of the War Department and the evidence filed show that the appellant's command was at Harrisburg until after the 1st of July, it does not appear to be possible that the soldier could have left it and, by making a detour, alone, have reached a position at Cham-

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bersburg in the rear of the enemy on the 26th of June, and have remained there during the period of their invasion until August 1, 1863.

In the case of Stephen Thompson (7 P. D., 26), it was held that—

An official contemporaneous record is the best evidence as to the facts therein recited, and will generally be accepted by the Department as conclusive. It may, however, be shown by competent proof to have been erroneous, but this proof must be of the strongest character.

The evidence in this case shows that it would have been impossible for the appellant to have left his command at Harrisburg at any time between the date of his enlistment on June 20, 1863, and make his way alone through a country infested with the enemy's troops until he reached Chambersburg, which was then in their possession, and remained there unmolested from June 28 until after they had recrossed the Potomac River.

The opinion of the Bureau that eight days is too short a period for the incubation of typhoid fever is not in accordance with the conclusions reached by the commission which was appointed by the United States to investigate and report upon the prevalence of typhoid fever among the American soldiers in 1898. One of their statements given as a result of their investigation is as follows: "The shortest period of incubation of typhoid fever is probably something under eight days." See article, entitled: "Conclusions reached after a study of typhoid fever among American soldiers in 1898," read before American Medical Association at its meeting at Atlantic City, N. J., in June, 1900, and published in the Philadelphia Medical Journal, on pages 1315 to 1325, in June of that year.

It is evident from the facts in this case that the report of the War Department is incorrect in stating the date of the commencement of the appellant's illness and that the Bureau has erred in stating that eight days is too short a period for the incubation of typhoid fever.

The action of the Bureau is therefore reversed and the case is remanded for further action in accordance with this opinion.

DESERTION—SERVICE—HONORABLE DISCHARGE.

HENRY P., ALIAS PATRICK H. BURNS.

The appellant first enlisted, under the name of Patrick H. Burns, for two years, in Company B, Thirty-fifth New York Volunteer Infantry, and served therein until February, 1862, when he deserted, and was never formally discharged therefrom. He enlisted a second time on August 7, 1862, while a deserter from said organization, under his correct name of Henry P. Burns, for three years, in Company M, Fifth New York Heavy Artillery, and served therein until June 26, 1865, when he was mustered out and honorably discharged the service with said company. He was pensioned under the provisions of the general pension law for an injury to head and back, incurred in July, 1864, during his second term of enlistment. On February 9, 1897, he was dropped from the rolls because of his desertion from Company B, Thirty-fifth New York Volunteer Infantry.

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Held: That appellant's contract of enlistment in Company B, Thirty-fifth New York Volunteer Infantry, having expired by limitation long prior to the incurrence of the injury for which he was pensioned, the offense of desertion terminated with said contract of enlistment, and at the time of the incurrence of said injury he was no longer in desertion, but was in line of military duty under his second enlistment, and occupied a pensionable status, and the action dropping him from the rolls because of desertion from his first service was error. (See case of John Norton, 9 P. D., 382.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 27, 1901.

Henry P. Burns, late a private in Company B, Thirty-fifth New York Volunteer Infantry, and Company M, Fifth New York Volunteer Heavy Artillery, was formerly pensioned under the provisions of the general pension law at the rate of $10 per month for an jnjury to head and back and resulting neuralgia, and on February 9, 1897, he was, after due and legal notice, dropped from the rolls and his pension terminated upon the ground that he had deserted from his first term of enlistment for military service during the war of the rebellion in Company B, Thirty-fifth New York Volunteer Infantry, and had never been discharged therefrom.

From said action appeal was taken on August 17, 1900.

The official military record of this appellant's army service during the war of the rebellion shows that he first enlisted on May 7, 1861, under the name of Patrick H. Burns, in Company B, Thirty-fifth New York Volunteer Infantry, for a term of two years, and was mustered into the military service of the United States for a term of two years, as a private in said company, on June 11, 1861, and served therein until the month of February, 1862, when he deserted from hospital at Elmira, New York, on some date prior to the 28th of said month, the exact date of said desertion not being shown. He never rejoined said company and regiment from desertion, and never received a formal discharge therefrom.

He enlisted a second time on August 7, 1862, while still a deserter from his first term of enlistment, under his correct name of Henry P. Burns, in Company M, Fifth New York Volunteer Heavy Artillery, for a term of three years, and served in said organization from that date to June 26, 1865, when he was mustered out and discharged the service with his company.

The appellant's first contract of enlistment for military service in Company B, Thirty-fifth New York Volunteer Infantry, was for a term of two years from June, 1861, and expired by limitation in June, 1863, the record showing that said company was mustered out of the service by reason of expiration of term of enlistment on June 5, 1863.

The injury to head and back for which the appellant was pensioned was alleged by him and shown by the evidence upon which his claim for pension on account of said injury was admitted to have been incurred

in July, 1864, while he was serving under his second contract of enlistment in Company M, Fifth New York Heavy Artillery.

Said injury was, therefore, incurred more than a year after the expiration of the appellant's first term of enlistment in Company B, Thirty-fifth New York Volunteer Infantry.

The action, dropping this appellant from the rolls from which this appeal was taken, was had under the decision of this Department in the case of George Lessor (8 P. D., 114), wherein it was held:

That a claimant against whom there stands a charge of desertion under an enlistment for service in the war of the rebellion, which charge the War Department declines to remove, has no title to pension under any existing law on account of disability incurred in said war, or service performed therein.

This ruling and decision was subsequently, however, partially overruled, and very greatly modified by the decision in the case of John Norton (9 P. D., 382), wherein the whole subject of desertion in its relation to, and bearing upon pensions, and claimants for pension, was most thoroughly and exhaustively discussed and carefully considered, and the present views and holding of this Department announced.

In said decision it was stated, among other conclusions reached, as follows:

If the disability was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

It is to be observed that the foregoing ruling holds that a disability incurred in the service "while the claimant was a deserter from a prior enlistment" was not pensionable, and this not simply upon the ground that he was a deserter from such prior enlistment, as was held in the Lessor case, but solely upon the ground that at the time of its incurrence he was not in the line of duty for the reason that he was then absent from his proper command in violation of his former contract of enlistment

It was also laid down in said decision in the Norton case (supra), as a correct principle of law governing the question of desertion, following the opinion of Attorney-General Taft (15 Op., 157), which is therein quoted with approval—

that the contract of enlistment must in all cases, even in that of desertion, be regarded as having expired when the last day of the term of enlistment therein fixed has elapsed. And since the obligation to serve depends on the contract, and necessarily ceases therewith, the offense of desertion, on grounds already set forth, must be deemed to terminate at the same time. In short, that offense may be viewed as continuing up to the end of the term of enlistment, but not beyond.

Applying these principles to the facts of the present case, it is apparent that this appellant can not be considered as having been in desertion at the date of the incurrence of the injury for which he was

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formerly pensioned, for his first contract of enlistment had expired by limitation long prior thereto, and his desertion from his first term of enlistment necessarily terminated with the expiration of said contract. Said injury was, therefore, not incurred while the appellant was a deserter from a prior enlistment; nor can it be held that it was not incurred in line of duty upon the ground that he was then absent from his proper command in violation of his former contract of enlistment, since his former contract of enlistment having expired there was at the date of the incurrence of said injury no existing legal obligation resting upon the appellant to serve in his former command, nor could he have been held to such service except as a punishment for his offense of desertion duly imposed by sentence of a court-martial.

It is true that the enlistment of this appellant in Company M, Fifth New York Heavy Artillery, was at a date prior to the expiration of his first term of service under his former contract of enlistment in Company B, Thirty-fifth New York Volunteer Infantry, and while he was undoubtedly a deserter from said latter organization, and was, therefore, illegal and in violation of the twenty-second (now fiftieth) article of war, but it is held by the authorities of the War Department that the validity of a second term of enlistment, if faithfully performed, while the first, by reason of desertion, is yet unfinished—

Is voidable by the United States, but not void; or, in other words, that it is valid until avoided by the United States; so that if it be not avoided before its expiration it becomes a complete, legal term of service. (See case of John Turner, First Iowa Infantry, cited in decision in case of George Lessor, supra.)

The record shows that this appellant's service under his second contract of enlistment was faithfully performed, and that the United States took no steps to avoid said service by arresting him as a deserter and returning him to his proper command prior to the expiration of his first term of enlistment, but permitted him to complete the same and honorably discharged him therefrom. Under said holding of the War Department, which has been held to be authoritative and binding upon this Department in such matters, said second term of service becomes and was a "legal term of service," and it necessarily follows that the appellant must have been in line of military duty as a soldier at the time said injury was incurred.

The action dropping the appellant from the rolls upon the ground stated was, therefore, clearly erroneous under the principles and ruling laid down in the Norton decision (supra), and said action is hereby reversed and set aside, and you are directed to cause the appellant to be restored to the rolls from the date of dropping and at the same rating he was then receiving.

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PRACTICE—REDUCTION RATE—ACT JUNE 27, 1890.

MARY M. DE GOUGH (WIDOW).

The rate of $8 per month, to which this soldier was reduced, appears to be fairly commensurate to the degree of incapacity for earning a support shown to have existed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 30, 1901.

This appellant, Mary M. De Gough, is now pensioned, certificate No. 462755, under the act of June 27, 1890, as the widow of Thomas L. De Gough, who was a member, from April 21, 1861, to January 26, 1864, of Company E, First Missouri Light Artillery, and died September 5, 1897.

In November, 1891, said soldier was allowed pension, certificate No. 684549, under said act at $12 per month on account of injury of left leg, deafness of right ear, and loss of sight of right eye; but in April, 1895, was reduced to $8 per month, pursuant to the decision of the Department in the case of Charles T. Bennett (7 P. D., 1).

On June 15, 1898, said widow filed a claim for restoration from date of reduction of the original rate allowed the soldier, but was informed July 9, 1898, and again November 12, 1898, that such claim could not be considered because "the soldier drew the reduced rate for over two years without demur."

On December 12, 1898, she appealed, contending that this claim should be adjudicated and allowed.

In March, 1900, without notice to the Department, the appealed claim was adjudicated by your Bureau, the action of July and November, 1898, being held by the adjudicating division (the Southern) to have been "under a misconception of the Hughes decision (9 P. D., 152), which has since been defined by the Heinrichs decision (10 P. D., 321)."

The claim was then adjudicated as one "under the act of March 6, 1896," and was rejected, reduction of rate being adhered to.

This action by your Bureau subsequent to the appeal was contrary to the rules of practice relative to appeals, which provide that no further action in an appealed claim shall be taken by the Bureau without the order of the Department.

Furthermore, the action taken was erroneous in itself. The act of March 6, 1896, has no application to this case, as it applies, by its terms, only to cases where several claims have been filed by a soldier, and it relates merely to the commencement of pension in such cases.

It provides that—

whenever a claim for pension under the act of June 27, 1890, has been, or shall hereafter be, rejected, suspended, or dismissed, and a new application shall have been, or shall hereafter be, filed, and a pension has been, or shall hereafter be, allowed in such claim, such pension shall date from the time of filing the first application, * * *.

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In this case the soldier filed but one claim for pension, which was allowed, pension dating from the filing of the claim. There was no rejection, suspension, or dismissal of one claim and filing of another, as contemplated in that act, and no facts which could bring the case within the provisions thereof, as pension was properly commenced from the only possible date for commencement in the case, and no question as to commencement, the only point to which the act of March 6, 1896, relates, could arise.

The only question in this case is whether a pensioner's widow may contest, either in the Bureau of Pensions or on appeal (and if she has the former right she necessarily has also the latter), the propriety of a reduction of his pension, to which he himself made no formal objection during his lifetime.

It has been uniformly and repeatedly held that a widow has no right to file an original claim for re-rating or for increase of her deceased husband's pension, although she may complete any such claim filed by him and left pending at his death (Caroline E. G. Colby, 7 P. D., 24); also, that she may appeal from rejection, prior to his death, of any such claim (William H. Hughes, deceased, 9 P. D., 152), or from action as to commencement of his pension under the acts of June 27, 1890, and March 6, 1896 (William Heinrichs, 10 P. D., 321).

The soldier in this case unquestionably had the right to appeal from the action reducing his pension. His widow also, then, has this right, under the decisions in the case of Hughes, supra; and if such right exist, the soldier during his lifetime, or his widow after his death must, consistently, be held to have also the further right to file additional evidence as to the merits of the reduction, and in case such evidence is held not sufficient to warrant restoration of the former rate, to file an appeal also from such holding.

When notice of contemplated reduction was served upon the soldier in December, 1894, he filed the affidavit of his physician stating, from an examination then made, that he was rendered "incapable of manual labor at least about 75 per cent;" and it was in accordance with this testimony and the certificate of an examination made in June, 1891 (the only one in the case), that the pension was reduced, said examination clearly showing that the soldier was not, at the date thereof, wholly incapacitated for earning a support.

The widow has filed affidavits by several other physicians tending to show that the soldier was wholly unable to labor for about two years prior to his death, or from the fall of 1895. This testimony, however, is not sufficient to controvert that of the soldier's own physician, who examined him in January, 1895, three months only prior to the reduction of pension, and found him then but three-fourths disabled for labor.

The reduction in rate appears to have been entirely proper, and is affirmed.

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RESTORATION—ACT JANUARY 29, 1887—REMARRIAGE.

DORA V. OTIS, NOW CROWLEY (AS WIDOW).

Section 4708 of the Revised Statutes is applicable to widows pensioned under the first section of the act of January 29, 1887, and upon the remarriage of the widow pensioner she becomes no longer entitled to the pension under the provisions of said first section, the provisions of the second section providing for the continuance and enjoyment of such pension during the natural lives of the persons entitled thereto being no longer applicable to her.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 6, 1901.

This is a motion, filed November 4, 1899, praying for a reconsideration of the decision of this Department of September 30, 1899, affirming on appeal the rejection by the Pension Bureau of the application of Dora V. Crowley, formerly Otis, for restoration of the pension that had formerly been allowed her under the provisions of the act of January 29, 1887, as the surviving widow of Charles R. Otis, who served as a private in Company G, Sixteenth United States Infantry, during the Mexican war, upon the ground that she had forfeited her title to such pension by her remarriage in July, 1892, to one Covel R. Crowley.

In the present motion it is very earnestly contended that said action and decision are not in accord with the provisions of the second section of the act of January 29, 1887, that the pension therein provided shall be paid for and during the natural life of the person entitled thereto, or during the continuance of the disability for which the same shall be granted; that this provision is clearly inconsistent and in conflict with the provision of section 4708, Revised Statutes, that on the remarriage of any widow having a pension such pension shall cease, and, by the express terms of the fourth section of said act, only such provisions of the general pension laws in force at the date of its passage as were not inconsistent or in conflict with the terms of said act were applicable thereto; and that no provision of law existed which limited the continuance of the pension granted to a widow under the provisions of said act to the period of her widowhood.

This was the same question which was raised by and urged in support of the appeal in this case, and it would seem to have been sufficiently answered and disposed of in the decision of the Department rendered on said appeal.

In addition to what was there said, however, it may be stated that the grant of pension provided in the first section of the act of January 29, 1887, is, by the express terms of the act, made directly to and only to the widow of the Mexican war soldier, and such widow is entitled to receive the same only upon the condition that she has not remarried. The language of said section, when construed in connection with all other provisions of the pension laws in pari materia,

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clearly and unmistakably shows that it was the meaning and intent of the act to grant such pension to the widow of the soldier and to no one else, and that no person other than the widow of the soldier would be entitled thereto. The reason and intent of the statute is the law. Consequently, when the widow pensioner under the act of January 29, 1887, remarries and ceases to be the widow of the Mexican war soldier, on account of whose military service and death said pension was granted, she is no longer entitled to receive said pension under the terms of the act granting the same.

The second section of said act provides for the payment of the pension granted by the first section "for and during the natural lives of the persons entitled thereto, or during the continuance of the disability for which the same shall be granted." It is only "the persons entitled thereto" under the provisions of the first section to whom such pension is payable for and during their natural lives, or during the continuance of the disability, under the provisions of the second section. The continuance and enjoyment of the pension during life, or the existence of the disability, is provided by the terms of the statute for no other persons, or class of persons whatever.

Since, upon the remarriage of the widow pensioner she becomes no longer entitled to the pension under the provisions of the first section of said act, the provisions of the second section, providing for the continuance and enjoyment of such pension during the natural lives of the persons entitled thereto, are no longer applicable to her, and there is no conflict or inconsistency in applying to her the provisions of section 4708, Revised Statutes, which terminate the pensions of all widow pensioners upon remarriage.

For these reasons, in addition to those stated in the decision on the appeal of this case, the Department is of the opinion that no error was committed by the decision referred to, or by the action of the Pension Bureau, thereby affirmed, and said decision and action will, therefore, be adhered to, and the motion is overruled.

MARRIAGE IN LOUISIANA—EVIDENCE—PRESUMPTIONS.

MINNA WILSON (WIDOW).

There being no proof or facts warranting the presumption of a prior marriage by the soldier, and the undisputed evidence showing that claimant and soldier lived and cohabited together as man and wife for eleven years in the State of Louisiana, the law of that State would presume them married, and the claimant is therefore entitled to pension as the lawful widow of the soldier.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 8, 1901.

Minna, widow of Hiram Wilson, late private, Company C, Sixty-third United States Colored Volunteer Infantry, filed a declaration for

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pension under the act of June 27, 1890. September 26, 1890. April 23, 1894, this claim was rejected, after special examination, on the following ground:

That claimant is unable, with the assistance of a special examination, to prove that she is the soldier's legal widow. Soldier left surviving a child, not by claimant, and claimant is unable to show removal of impediment afforded by prior marriage to mother of said child.

November 15, 1898, the claimant, by her attorneys, filed an appeal to the Department, alleging as grounds therefor the following:

It is submitted that the action of rejection is error on the ground (1) that a legal marriage of the soldier prior to his marriage to the claimant is not shown by the evidence, and (2) that the claimant is not obliged to prove the death or divorce of a possible former wife, but that, having proved the fact of her own marriage to the soldier, the burden of proof is on the Government to disprove its legality, according to a well-known rule of law, and according to the decision in the case of Jenette Burton (9 P. D., 31).

This appeal raises the question of the legality of the marriage between the claimant and soldier.

It will be noted that the rejection obtained because the claimant did not prove that a supposed former wife of the soldier was not dead or divorced at the date of the marriage, which is the foundation of the claim. This cause of rejection may be easily disposed of. The soldier was a slave when he entered the service, and any marriage by him prior to that time was a slave marriage and therefore the parties were not able to enter into a valid marriage contract.

The alleged prior marriage, from the evidence, must have been contracted in the State of Mississippi. In 1869 the State of Mississippi adopted a constitutional provision providing that those who were at that time cohabiting as man and wife, yet without being legally married, should thereafter be considered as lawfully married and their children as legitimate. Under this provision slave marriages to be thus legalized must have been followed by cohabitation down to the date of its adoption and only where the subsequent commerce was intended to be matrimonial. (Andrew *v.* Simmons, 68 Miss., 732; Rundle *v.* Pegram, 49 Miss., 75.)

Upon what theory any alleged prior marriage of the soldier could be accepted as a bar to the soldier's marriage to the claimant does not appear. His marriage prior to his entry into the service was a slave marriage, and it was never legitimatized by any act of the parties or any law passed subsequent to its date. (1 Bishop on Marriage and Divorce, par. 659; 1 Bishop on Marriage and Divorce, pars. 661–663: Am. and Eng. Ency. of Law, vol. 22, p. 789.)

No more discussion is necessary upon this point, but it remains to be said that the only evidence in the case that there was ever a prior slave or any other kind of a marriage by the soldier is that he had a boy with him at the date of marriage to claimant, or soon thereafter, and declared that the boy was his son, and that claimant stated there

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was a boy who was known as her husband's son. No other warrant for presuming a prior marriage exists in this case. The soldier was a slave, and there is no proof of any kind as to a marriage by him prior to the alleged marriage to the claimant.

This sweeps out of consideration the question of the bar to the marriage between the claimant and soldier because of a prior living and undivorced wife. There remains for consideration, however, the question of the legality of the marriage which is the foundation of the claim at bar.

Marriages, such as the one under consideration, are to be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued. (Section 2, act of August 7, 1882, amending section 4703, Revised Statutes.)

The evidence in the record is to the effect that the claimant was married to the soldier in November, 1865, and while the soldier was still in the service, the war records showing that he was mustered in November 1, 1863, and mustered out with his company January 9, 1866.

The claimant and soldier were competent to contract a valid marriage in November, 1865, the State of Mississippi having completely passed under Federal control. The emancipation proclamation had full moving force and effect at that date throughout the State, thus freeing from the limitations of slavery both parties to the contract. See Harriet Tinnin (8 P. D., 218) for a complete review of the law on the subject of the effect of the emancipation proclamation of President Lincoln of January 1, 1863.

The evidence regarding the marriage consists of the statements of the claimant, a comrade of the soldier, and a son of the claimant by a prior marriage, and is to the effect that it took place in Natchez, Miss., in November, 1865. The claimant declares she had a license but that she had lost it. It is thought to be immaterial and therefore unnecessary to further discuss the character of the ceremony by which the marriage was celebrated, because under the law her title rests upon the legality of the marriage according to the laws of Louisiana, where the right to pension accrued.

The undisputed evidence is that on his muster out the soldier went to Davis Bend, Miss., and lived there with the claimant until 1867, when they moved to Waterproof, La., living there for five or six years, then moving to Concordia Lake, La., where in 1878 the soldier was hung by a mob during the "Fairfax" riots of that year.

During all this time the uncontradicted testimony is that the soldier and claimant lived and cohabited as man and wife and were known in the community where they resided as husband and wife. This was during a period of eleven years prior to the death of the husband of the claimant.

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One of the leading cases in this country on the subject of marriage and presumptions from acts of cohabitation and living together as man and wife is that of Holmes *v.* Holmes (6 La., 463).

The opinion is a short one and is quoted almost in its entirety:

The plaintiff alleges that his wife and child came as passengers from Liverpool to New Orleans in a vessel of which the defendant was master; that she engaged a cabin passage, but agreed to sleep in a stateroom in the steerage, the staterooms in the cabin being taken up. He claims damages for a violation of the contract, alleging that his wife was driven out of the cabin, compelled to eat with the servants, and in other respects illtreated on her passage. The defendant admits that "one Eliza Holmes, with her child," did come out as passengers in the ship, but he alleges he did not violate his contract, and that any change of her accommodations on board was justified by her improper behavior. He adds that, being ignorant whether said Eliza be married, as is alleged by the plaintiff, he requires strict proof of the marriage which he denies to exist. On the trial plaintiff offered witnesses to prove that the plaintiff and Mrs. Holmes, who were then in court, had lived in New Orleans a length of time and had a family, and were reputed husband and wife. This evidence was rejected by the court, a bill of exceptions taken, and judgment of nonsuit being rendered the plaintiff appealed.

It was contended by the appellee before the supreme court of Louisiana that as the code requires marriages to be celebrated in the presence of three witnesses, and an act to be drawn up and signed by the parties, the witnesses, and the person performing the ceremony, parole evidence is inadmissible to prove a marriage in this State.

Marriage is regarded in our law in no other light than as a civil contract, highly favored, and depending essentially on the free consent of the parties capable by law of contracting. Our code does not declare null a marriage not preceded by a license and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorized to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence, not prohibited by law, which does not presuppose a higher species of evidence within the power of the party; and cohabitation as man and wife furnishes presumptive evidence of a preceding marriage. It is not to be presumed that those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the father gives his name and administers a parent's protection and support, are living in open disregard of public morals, and that their common offspring are bastards. Such a family is already in the possession of a civil condition or status not to be questioned lightly or collaterally. * * *

See also In succession of William Hubee (20 La. An., 97).

Proof of cohabitation in the absence of proof of celebration is good evidence to establish a marriage. (Taylor *v.* Swett, 3 La., 33; Wyche *v.* Wyche, 5 Martin, La., 201; Hubbell et al. *v.* Inkstein et al., 7 La. An., 252).

In the case of Hobdy *v.* Jones (2 La. An., 944), the supreme court said:

In an action for damages for slander in asserting that plaintiff was living in concubinage with a person represented to be his wife, proof by plaintiff of cohabitation and reputation as husband and wife is sufficient evidence of a marriage.

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In his charge to the jury the trial judge said:

The circumstance of the plaintiff and his wife living together as man and wife was prima facie evidence of a marriage between them.

In this view he was sustained by the supreme court.

Evidence of cohabitation creates a presumption of marriage. (Beaulieu *v.* Ternoir, 5 La. An., 480; Cole *v.* Langley, 14 La. An., 770.)

In the case of Mrs. Powers *v.* Executors of Charmbury (35 La. An., 630) the supreme court says:

In the absence of primary evidence to prove marriage it may be proved by secondary or circumstantial evidence. Reputation and long cohabitation will create a presumption of marriage, but such presumption can be rebutted by negative testimony. Acts of the parties showing their own conception of their mutual relations are the best test of the legality of marriage the celebration of which no proof has been or can be produced. The reputation which gives rise to a presumption of marriage must be general and consistent, and must rest on proof showing that the relations between the parties began with free consent to enter the state of matrimony.

In the case of Blasini et al. *v.* the Succession of Blasini, (30 La. An., 1368), the supreme court says:

By our law marriage is a civil contract. The most important of all contracts it is meet, it is decent, that it should be celebrated with such publicity and such solemnities as would leave no defect of proof that the parties were able to contract, that they were willing to contract, that they actually did contract. The presence of the civil magistrate or minister, and of kindred and friends, is eminently proper; and the license gives assurance of the absence of all legal obstacles. But the law does not require written evidence of the marriage, nor the testimony of those who were present and witnessed the ceremony; nor does it avoid the contract for the want of a license. In many cases it would be cruelty to require proof of actual marriage. * * * The law will not tolerate the presumption that a man and woman who live together publicly as husband and wife are really living in concubinage in violation of law and public decency. From certain established facts certain legal presumptions are deduced, and when it is proven that the parties from the time of their first appearing together in the community in which they made their permanent domicile publicly cohabitated, assuming to be husband and wife, without separation or interruption until death intervened; that the woman bore the man's name, and he called her his wife and introduced her as his wife, and declared that he had married her; where they present to the world their offspring as their children and rear and care for them, the law accords to the man and woman and to their children a legal and social status, based upon the presumption of marriage, the consequences of which is the presumption of legitimate filiation and descent, which imposes on those who assert the contrary the burden of destroying that presumption. This presumption does not sanction voluntary cohabitation nor elevate concubinage of whatever duration to the dignity of marriage. When it is said that marriage may be proven by reputation the meaning is that the acts and conduct of the parties, as established by satisfactory proof, author ize and create the presumption that they were actually married, and this presumption is such that it yields only to proof that there was no such marriage or that it was void because of some nullity established by law.

The evidence in this case is undisputed on the material point of the claimant living and cohabiting with the soldier from the date of the

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marriage as alleged in Mississippi up to and until his death, a period of twelve years. Because there is no conflict in the testimony it has been considered unnecessary to quote from it.

It is conceded that satisfactory proof as to an actual ceremony of the marriage is wanting, but all the facts established by the claimant, and the application of these facts to the law of Louisiana, warrant the conclusion that she would be recognized as the lawful widow of the soldier in that State.

It becomes unnecessary to discuss the question of the burden of proof referred to by the attorneys in their appeal, for the reason, as above stated, no prior legal marriage was shown, nor on the existing facts and conditions could one be presumed.

The action appealed from is reversed.

EVIDENCE—VICIOUS HABITS—PRESUMPTION.

BENJAMIN F. PETERMAN.

Vicious habits can not be presumed, in case of an injury, unless there is something concerning the nature or character of the injury which warrants such a presumption, or unless the evidence shows certain facts which are sufficient to raise such a presumption.

Where neither the nature of the injury nor the evidence adduced raises such a presumption, the testimony of two credible witnesses, to the effect that claimant is now a man of good habits, and that they do not believe, and have no reason to believe, that the said injury was due to vicious habits, will be considered as sufficient to meet the requirements of the statute, provided always that the claimant is a man of good repute for veracity, and that he shows that no better evidence is obtainable by him.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 11, 1901.

Benjamin F. Peterman, formerly a private in Company E, Eighty-fourth Pennsylvania Volunteer Infantry, filed his declaration under the act of June 27, 1890, on May 5, 1898, claim being rejected on November 17, 1898, on the ground that claimant was unable to show "that he was not addicted to vicious habits at date when injured." The medical action was, "no ratable disability shown independent of loss of fingers." An appeal was filed on December 19, 1898, and with it the affidavit of one who swore that she was a member of claimant's family at the time of the injury, and that said injury was not due to vicious habits. The claimant having previously stated that the injury to his left-hand, which consisted of the loss of a portion of three of the fingers, occurred in June, 1882, while he was running an edger in Chippewa County, Wis., but that he was unable to produce the affidavits of eyewitnesses for the reason that he had failed to find their addresses, although he had sought for them, the testimony filed with the appeal was referred back to the Commissioner of Pensions with

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instructions to pass upon the same, and for a return of the papers to this Department in order that the question at issue might be decided with as little delay as possible. The papers have been returned, and it is noted that action of rejection was had on April 11, 1901, upon the ground that the new evidence is not sufficient to prove that claimant was not addicted to vicious habits on the date on which the injury occurred.

It is first to be noted that the action of the medical referee is couched in indefinite terms. Said action does not give accurate information as to whether or not there is a pensionable disability in the case even if the injury to the left-hand be included, although it would be a fair inference, from the express terms of the action taken, that there was a ratable disability if the injury of the hand were included. The Department, however, desires to state at the outset that it does not express an opinion upon the degree of disability existing in this case, that being a matter which should be decided later on by the proper officials, and in such terms as would leave no doubt as to their true meaning.

This claim stands rejected upon the ground that claimant has not shown "that he was not addicted to vicious habits at the date when injured." From a technical standpoint the rejection was error, for the reason that claimant may have been addicted to vicious habits at the date when he was injured and yet be entitled to a pension. The issue under the statute is, Did vicious habits on the part of claimant contribute in any manner to the disability by reason of which he claims pension? It matters not how many vicious habits claimant had at the date when the alleged injury took place unless such vicious habits were the cause of the injury.

The facts necessary for a proper understanding of the issue in this case are as follows: The claimant swears that his fingers were cut off while he was engaged in operating an edger in a sawmill. He states that the accident occurred some sixteen years prior to the filing of his claim; that it was not the result of any vicious habits on his part; that it is impossible to produce the testimony of eyewitnesses, and he submits the only evidence he can procure. Said evidence is the sworn affidavit of one Hattie L. Henderson, who states she was a member of claimant's family at the time said accident occurred; that she knows him to be a sober man, and that the said injury is not the result of vicious habits. It is apparent, from the formal part of her affidavit, that she was but 9 years of age when the accident occurred.

The only question in this case is as to the kind and amount of testimony necessary to prove that a certain disability is not due to vicious habits. It is a well-accepted fact that not everything required to be proved must necessarily be subjected to the same degree of proof. Some matters are accepted as proved upon the production of very

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slight testimony, while other matters require the strongest and most convincing evidence. The question at issue in this case was very ably discussed in the opinion of the case of John Martin (7 P. D., 578), and it was therein demonstrated that no general rule could be laid down as a standard by which all cases could be judged. It was, in said opinion, held that in claims where the facts were similar to the one under discussion, and wherein there was nothing to create a suspicion that habits had any agency in producing the disability, that it was sufficient, provided that claimant was unable to produce testimony from persons who had actual personal knowledge of the origin of the said disability, for him to file his own affidavits, which should recite the circumstances under which the disability was incurred, together with the testimony of two credible witnesses who had known him from a time antedating said incurrence, to the effect that claimant was a man of good habits. The above rule was laid down to be applied to cases wherein the nature and character of the injury was not such as to raise a presumption that the said injury was due to vicious habits, and the rule has been the standard of judgment in this Department ever since it was promulgated.

It still appears to this Department that each claim wherein the question of vicious habits is raised must stand upon its own footing. The law requires, virtually in express terms, that the disability must be shown to be not due to vicious habits. The Department has no desire or intention to break down reasonable checks and safeguards surrounding the adjudication of pension claims, or of weakening the class of evidence necessary to establish certain facts, by substituting other evidence than is usually employed in ordinary courts of law to prove certain facts. But this Department will not, on the other hand, sanction the employment of safeguards or checks not necessary under the law, or which will put a claimant to a degree of proof not warranted by the facts in the particular case.

This claimant swears that he lost his fingers while operating an edger in a sawmill in 1882, and can not secure testimony of eyewitnesses, although he has sought diligently therefor. The occupation was a hazardous one, and the accident not unusual to occur to the most sober and cautious individual while pursuing such an occupation. Intoxication is the most probable vicious habit which would be considered to arise in this case, and it is safe to assume that such an accident would occur, in any number of given cases, much more frequently to sober individuals than to intoxicated ones. The employment of persons, when intoxicated, in hazardous occupations, is unusual by employers on the ground of self-interest, as well as by the parties themselves from the natural instinct of self-preservation. The reasonableness of such a statement is apparent from everyday experience and common sense.

There is no reasonable or natural presumption that one is addicted to vicious habits; the presumptions are all the other way. There is

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nothing in the nature of the injury described in this case which would raise a valid suspicion that it was the result of vicious habits, and claimant should not be put to any great degree of proof in order to show that the described injury was not the result of vicious habits. It is believed that even a broader rule than that laid down in the opinion in the case of John Martin, supra, would amply fulfill the requirements of the statute in a case like the one under consideration, and in others, of which there are many, where the facts are equivalent or similar to those in the present case.

Where there is nothing in the nature or character of an injury shown to exist which would raise any reasonable suspicion that it was the result of vicious habits, vicious habits should not be presumed, and claimant should not be required to furnish any unreasonable testimony. His own affidavit, and the affidavits of two or more credible witnesses that he is a man of veracity and of good habits, will be considered as sufficient, notwithstanding the fact that the corroborating witnesses have no personal knowledge of the said incurrence, and notwithstanding the further fact that they had no acquaintance with the claimant until a date subsequent to the incurrence, always provided that claimant has satisfactorily shown that such evidence is all that can be obtained by him. The corroborating witnesses should also be able to swear, and so do, that from their own personal knowledge of claimant they do not believe, and have no reason to believe, that the disability shown to exist was in anywise due to vicious habits.

In the case at bar claimant has given a seemingly straightforward account of the circumstances under which he incurred his injury. He has furnished the testimony of an individual who is now 26 years of age to the effect that he is a man of sober habits and that she knows of her own knowledge that the injury was not incurred by reason of vicious habits. If this affiant is a person of good repute for truth, her testimony can not be discarded on account of the fact that she was but 9 years of age when the accident occurred. This is not testimony of a child 9 years of age, but is the testimony of an adult person as to matters happening in her childhood, and it can not be presumed that she testifies falsely in regard to such matters. Were not other testimony obtainable, the Department would have no hesitancy in admitting claim under the evidence now in the case. It is believed, however, that this claimant will experience no difficulty in showing that he has been a man of good habits from a period antedating the accident; but if from untoward circumstances the claimant can not produce such evidence, it will be sufficient if he show that he is now a man of good habits, and that his witnesses swear that they have no reason to believe that the injury to the left hand was the result of vicious habits.

The action appealed from is set aside and the case remanded for reopening and readjudication in conformity with the views herein expressed.

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JURISDICTION—MEDICAL EXAMINATIONS—EXPERTS—ACT JULY 25, 1882.

SAMUEL S. BOWMAN.

The third subdivision of section 4 of the act of July 25, 1882, confers discretion on the Commissioner of Pensions, in the exercise of which he may order a claimant to be examined by an expert without an examination before a full board of examining surgeons.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 21, 1901.

Samuel S. Bowman, formerly a member of the United States Marine Corps, filed a claim for pension under the general law September 17, 1897, alleging defective sight and impaired hearing. This claim was rejected May 25, 1898, on the ground of no disability from causes alleged since date of filing claim.

December 22, 1898, claimant, by his attorney, filed an appeal to the Department, which appeal is as follows:

Applicant in above-described claim for pension under the general law for impaired sight and total deafness of left ear.

On January 13, 1898, he was examined by a specialist in Philadelphia, Pa., and on his report his claim was rejected because of no disability.

March 25, 1898, he filed an affidavit describing the manner in which he was examined and protesting against the adjustment of his claim on the expert's report.

No attention was paid to his protest, although filed four or five months before the expert's report was acted on.

From the adverse action I have the honor to appeal and to submit that the applicant's protest should have been considered, and that the statements contained therein were sufficient to justify the Bureau in directing another examination, especially in view of the fact that the affidavit was presented before the applicant was aware of the result of the expert's examination.

Furthermore, I submit that under the first paragraph of section 4 of the act of July 25, 1882, the applicant should have been ordered before a full board of surgeons instead of an expert, and if that full board failed to satisfactorily determine the "degree of disability," then the Commissioner has authority to order an examination by an expert. Because an applicant alleges defective hearing and sight is no reason for assuming that the "degree of disability can not be determined truthfully or satisfactorily, excepting by expert examination," neither is it sufficient cause for denying an examination by a full board of surgeons.

Under the provisions of the paragraph above referred to, an examination by one surgeon can not be made except when it is impracticable for a claimant to present himself before a board.

When this applicant was examined he resided in the city of Philadelphia, Pa., where there are three or four boards, and it was not impracticable for him to present himself before one of them.

I respectfully request that you direct that this applicant be ordered for examination before a board of surgeons in order that he may have the benefit of such an examination as the law provides.

This appeal raises the question of whether the action of the Bureau in sending claimant to a specialist on diseases of the eye and ear instead of before a full board of examining surgeons, was proper.

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In a slip addressed to the honorable Commissioner of Pensions under date of August 29, 1898, the attorney has the following to say:

I respectfully protest against the rejection of the within described claim for the reason that it is based upon the report of a single surgeon (a specialist), the applicant not waiving his rights under the act of July 25, 1882.

At the time of his examination he was residing in Philadelphia, Pa., where there was two or three boards of surgeons, before one of which he should have been ordered to appear for examination. See decision in the case of Predmore, 8 P. D., p. 165.

I respectfully ask that the applicant be granted a medical examination in accordance with law, and that the case be referred to the medical referee for that purpose.

This slip was referred to the medical division, and under date of September 15, 1898, the following answer was returned:

In this case the claimant was accorded the benefit of an examination by an expert in diseases of eyes and ears, in accordance with act of July 25, 1882. This expert was not a member of a board of examining surgeons; hence the decision cited in the Predmore case does not apply in this case.

The issue squarely presented here is, was the claimant deprived of any of his legal rights when he was caused to report before a specialist before having been examined by a full board of surgeons?

The act of July 25, 1882, fixes the duty of the Bureau regarding medical examinations. The first subdivision of section 4 of said act is as follows:

That the Commissioner of Pensions is hereby authorized to appoint surgeons who, under his control and direction, shall make such examination of pensioners and claimants for pension or increased pension as he shall require; and he shall organize boards of surgeons, to consist of three members each, at such points in each State as he shall deem necessary, and all examinations, so far as practicable, shall be made by the boards, and no examination shall be made by one surgeon excepting under such circumstances as make it impracticable for a claimant to present himself before a board: *Provided*, That the Commissioner may, when in his opinion the exigencies of the service require it, organize a board of three surgeons who, under his direction, shall review the work of any regularly appointed board of surgeons: *Provided further*, That all examinations shall be thorough and searching, and the certificate contain a full description of the physical condition of the claimant at the time, which shall include all the physical and rational signs and a statement of all structural changes.

The third subdivision of the same section is as follows:

The Commissioner may, when in his judgment the degree of disability can not be determined truthfully or satisfactorily excepting by expert examination, employ an expert, not a regularly appointed surgeon, to make the examination; and the fee for such examination shall be five dollars: *Provided*, That the fee for an expert examination shall not be paid to any regularly appointed examining surgeon.

It will be noted that the first division of said section says:

* * * and all examinations, so far as practicable, shall be made by the boards, and no examination shall be made by one surgeon excepting under such circumstances as make it impracticable for a claimant to present himself before a board.

The words "so far as practicable" in the section doubtless refer to the nature of the examination, because in the same sentence the word

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"impracticable" in connection with the ability of the claimant to appear before a board is used. Be this as it may, it becomes unnecessary to discuss this division of the act in view of the well-known rule of construction of a statute that the whole of a statute must be considered in its construction. No one section or division of an act can be segregated and construed separately from the full context.

The third division of the section under consideration unquestionably gives the Commissioner discretionary power to send a claimant before an expert whenever "in his judgment the degree of disability can not be determined truthfully or satisfactorily," except by his so doing.

The claimant in this case alleged impaired vision and loss of hearing, disabilities peculiarly within the scope of an expert on the eye and ear to discover. It has been the practice of the Bureau for many years, in a claim where the only alleged disabilities are those which only an expert in those diseases can fully describe and discover, to send a claimant before the proper expert in order that he may have the benefit of learning and experience in that particular line. It is a well-known fact that the ordinary practitioner, engaged in the general practice of medicine, has at hand few appliances for the examination of the eye and ear, and generally can give only superficial examinations and report subjective conclusions.

From a careful consideration of the whole of the act of July 25, 1882, and its application to the case in issue here, it is concluded that the honorable Commissioner had the undoubted right to send the claimant before an expert for examination for the alleged disabilities. The law, in the division granting power to the Commissioner to employ an expert, limits that power to cases "when in his (Commissioner's) judgment the degree of disability cannot be determined truthfully or satisfactorily." In this case that judgment seems to have been fairly exercised, and in a case that called for its exercise.

It will be noted that the case of Byron A. Predmore (8 P. D., 165) is referred to by the attorney as deciding that the claimant had a legal right to demand an examination before a full board, where he had not waived that right. A careful reading of the Predmore case does not lead to any such conclusion. It is apparent that the third division of the fourth section of the act of July 25, 1882, was not considered in the opinion. Reference to it should have been made in that opinion, although the case under consideration at that time did not necessarily involve it. It will be noted, however, that the rules laid down for the guidance of the Pension Bureau are limited to claimants who "shall have been ordered before a board of examining surgeons."

It is stated in the opinion, page 169:

> The act of July 25, 1882, is, in so far as it deals with the subject of medical examinations of claimants for pension, mandatory in its terms. There is, therefore, no alternative course, and it must be enforced.

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This statement certainly does not apply to the third division of section 4 of said act, which, on its face, gives discretion to the Commissioner in certain cases. The portions of the act involved in the Predmore case are mandatory, and are so in all cases that do not come within the terms of the third subdivision of section 4 of the said act. The expression above quoted from the opinion is but dictum at best, for the reason that the portion of the act considered here was not under consideration in that case.

On March 26, 1898, the claimant filed in the Pension Bureau a protest against the examination by the expert on the ground that it was conducted in a cursory and unsatisfactory manner, demanding at that time his right to be examined before a full board. As to this protest the certificate from that examination will speak for itself. It is as follows:

Age 48 years. O. D. 20/82 p't 2 20/40 with a 1.75; O. S. 20/82 p't 2 20/40 added to distance; correction reads some of No. 1 J. at 12 feet. Is wearing 2.75 for near. Mild conjunctivitis; cornea clear. Pupils 3.5 M. M; react normally to light and convergence, and dilate regularly.

Coph. O. D. Lens and media clear; fundus normal, refraction as above. Vision with correction should be better, probably due to insensibility of the retinae. I find no disability as regards eyes.

Ears: Right, membrane opaque, somewhat thickened and contracted. Left, slightly opaque. Right, can't hear watch on contact or tuning fork at 1 inch. Left, watch at 7 inches; T. f. at 2 feet. Right, ordinary conversation at 3 feet, not at 6 feet; left, ordinary conversation at 20 feet. Bone conduction normal. Right eustachian tube impervious; left, pervious. Follicular pharyngitis and chronic rhinitis. Slight deviation of nasal septum to right side. Slight (catarrhal) deafness of right ear. Rating 4/30.

From this certificate it appears that the examination by this expert was thorough, extending to the inner structures, and that all well-known and approved tests were used to determine the exact extent of claimant's disability from causes alleged.

No legal or medical injustice seems to have been done claimant in this case and the action appealed from is affirmed.

JURISDICTION—GUARDIANSHIP—PENSION FUND—ACCRUED PENSION.

COMMISSIONER OF PENSIONS.

1. The guardian of a pensioner is the agent of the United States for the proper expenditure of pension money in his hands, irrespective of the duties devolved upon him by the State law.
2. A pension fund granted to a pensioner, in the hands of a guardian, is in transitu until it reaches its final destination, and is controlled only by the United States; and the Commissioner of Pensions is invested with the discretionary power necessary to the proper administration of the pension laws, and guardians holding pension funds are subject to his direction, both before and after the death of their wards.

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3. All funds which have accumulated in the hands of a guardian by operation of the pension law, and have not been paid to the pensioner or expended in accordance with law in his behalf, are in the nature of accrued pension.
4. An unexpended pension fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner, and is an accrued pension.
5. The act of March 2, 1895, is the law of distribution of accrued pension of a deceased pensioner, and applies to the fund in the hands of a guardian unexpended at the time of such pensioner's decease.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 22, 1901.

I am in receipt of your recent communication, which is as follows:

I have the honor to invite your attention to a condition of affairs resulting from the present and heretofore existing practice in paying pensions to fiduciaries, which suggested to me the necessity for some remedial action.

The guardians' accounts rendered to this Bureau in compliance with the requirement recently adopted with your approval show large and steadily increasing accumulations of pension money in the hands of many of this class of payees, and in many cases these accumulations are found to equal, or to largely exceed the amount of the bonded security.

For this state of affairs the causes shown or assigned are various.

In the cases of minor children the guardians are found to be withholding the pension with and without court instructions, to provide their wards "a starting in life" on attaining their majority. Such action may be appropriate and justifiable where the children have other means of support, but in many cases it is found they are being deprived thereby of the advantages of proper training during the formative period of their lives through the necessity they are put to of being self-supporting.

By far the more important cases, however, viewed as to the conditions herein dwelt upon, are those of the insane, as in such the highest rates of pension are involved and the pensioners are of that class for whose maintenance more or less adequate State provision is made. This provision the guardians are sometimes obliged to accept, and in certain of the States it seems the authorities of the hospitals provided, are prohibited from receiving substantial contributions in money or goods for the use and support of their charges, while in other cases guardians are found to avail themselves of such State provision and let it suffice, where the pension is ample to provide their wards the greater comforts and better medical attention to be obtained in private institutions, or there is nothing to prevent its being applied to supplement such provision. The result is that numbers of these pensioners are classed with and receive no better treatment than paupers, while the Federal bounty designed to save them from such condition is withheld from them for the enrichment of their legal representatives, who are, in many cases, not within the degrees of relationship to the pensioner entitling them to consideration under the pension laws, and were consequently not intended by Congress to be benefited by the pension fund, and should certainly not be admitted to participation therein through such deprivation of the pensioner.

There are many cases of this latter class. A statement of the conditions found in three of them is herewith submitted as best showing the evils of the situation, and the extent to which pension money is being diverted in the manner described.

As the law authorizing payment of pensions to guardians provides only that "payment to persons laboring under legal disabilities may be made to the guardians of such persons" (sec. 4766, R. S., U. S.) and is therefore held to be merely permissive and not mandatory in its terms, I would suggest as the most effective, if not the only

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available, corrective means in the present state of the laws that a wider discretion than appears to be permitted under departmental decisions in the Edward W. Moore case (P. D., vols. 8, p. 400, and 9, p. 55) be given me to exercise in the matter of authorizing payment of pensions to guardians, to the end that such payment may be made only as there is shown to be need of the pension for the pensioner's immediate use and benefit, and as it is shown to be so applied; the pension withheld in pursuance of such course to be paid to the pensioner upon his or her restoration to competency, or, in the case of minor children, upon their attaining their majority, and in the event of the pensioner's death, in accordance with the provisions of the act of March 2, 1895.

The inquiries propounded in said communication must be answered in the light of the laws, as embodied in the statutes and decisions of the Federal courts, which define the powers of the Commissioner of Pensions relating to money that has been paid to guardians of minors and insane persons.

So much of section 4766, United States Revised Statutes, as relates to the subject of investigation is as follows:

Hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to the provisions of this title; and no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any attorney, claim agent, broker, or other persons shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon; but the payment to persons laboring under legal disabilities may be made to the guardians of such persons in the manner herein prescribed, and pensions payable to persons in foreign countries may be made according to the provisions of existing laws: *Provided*, That in case of an insane invalid pensioner having no guardian, but having a wife or children dependent upon him (the wife being a woman of good character), the Commissioner of Pensions is hereby authorized, in his discretion, to cause the pension to be paid to the wife, upon her properly executed voucher, or, in case there is no wife, to the guardian of the children, upon the properly executed voucher of such guardian, and in like manner to cause the pension of invalid pensioners who are or may hereafter be imprisoned as punishment for offenses against the laws, to be paid while so imprisoned to their wives or the guardians of their children.

The penal laws relating to embezzlement of pension money are copied below.

SEC. 4783. Every guardian having the charge and custody of the pension of his ward who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding two thousand dollars or imprisonment at hard labor for a term not exceeding five years, or both.

SEC. 5486. If any guardian having the charge and custody of the pension of his ward shall embezzle the same in violation of his trust, or fraudulently convert the same to his own use, he shall be punished by a fine not exceeding two thousand dollars or imprisonment at hard labor for a term not exceeding five years, or both, at the discretion of the court.

The above-mentioned section was amended on February 10, 1891, so as to read as follows:

Every guardian, conservator, curator, committee, tutor, or other person having charge and custody in a fiduciary capacity of the pension of his ward, who shall embezzle the same in violation of his trust or fraudulently convert the same to his own

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use, shall be punished by fine not exceeding two thousand dollars or imprisonment at hard labor for a term not exceeding five years, or both, at the discretion of the court. (26 Stat., 746.)

Much light is thrown upon the subject of investigation by the decision of the Supreme Court of the United States in the case of the United States *v.* Hall (98 U. S., 343). Hall being the guardian of William Williamson, a minor pensioner, was indicted in the circuit court of the United States for the southern district of Ohio, under the provisions of section 4783, Revised Statutes, for having feloniously embezzled pension money belonging to his ward. The defendant appeared and demurred to the indictment, whereupon the following questions arose upon which the judges of the circuit court were opposed in opinion, which questions were duly certified to the Supreme Court:

1. Whether the circuit court has any jurisdiction over the alleged offense, or any power to punish the defendant for any appropriation of the money after its legal payment to him as such guardian, it appearing that the defendant is the legal guardian of his ward under the laws of his State; and that the money alleged to have been embezzled and fraudulently converted to his own use had been paid over to him by the Government and belonged to his said ward.

2. If the defendant did embezzle the money and convert the same to his own use after it was paid over to him by the Government, is he liable to indictment for the offense under the act of Congress, or only under the State law?

3. Is the act of Congress under which the indictment is found a constitutional and valid law?

After an exhaustive discussion of the question involved the Supreme Court announced the following conclusions:

It is competent for Congress to enforce by suitable penalities all legislation necessary or proper to the execution of power with which it is intrusted, and any act committed with a view of evading such legislation or fraudulently securing its benefits may be made an offense against the United States. (United States *v.* Fox, 95 U. S., 670.)

Acts of Congress granting such donations to officers, soldiers, and seamen, or to their wives or children, in some cases direct that the payment may be made to the attorney or agent of the beneficiary; in other acts the direction is that the payment may be made to the guardian of the party, and in still another class of such acts the requirement is that the money shall be paid directly to the beneficiary. (4 Stat. 350; 3 id., 569.)

For the defendant, it is insisted that when the payment is made to the guardian the money paid ceases to be within the constitutional control of the United States, and that the act of Congress, which enacts that the guardian who embezzles the money or fraudulently converts the same to his own use is guilty of a misdemeanor, is unconstitutional and void. But the court is unhesitatingly of a different opinion for several reasons: 1. Because the United States, as the donors of the pensions, may, through the legislative department of the Government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary. 2. Because a guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund, but if he does, he must accept it subject to the annexed conditions. 3. Because the word "guardian," as used in the acts of Congress, is merely the designation of the person to whom the money

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granted may be paid for the use and benefit of the pensioners. 4. Because the fund proceeds from the United States, and inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly until the passage into the hands of the beneficiary, which is all that is necessary to decide in this case. 5. Because the elements of the offense defined by the act of Congress in question consist of the wrongful acts of the individual named in the indictment, wholly irrespective of the duties devolved upon him by the State law. 6. Because the theory of the defendant that the act of Congress augments, lessens, or makes any change in respect to the duties of a guardian under the State law is entirely erroneous, as the act of Congress merely provides that the pension may be paid to the person designated as guardian, for the use and benefit of the pensioner, and that the person who receives the pension, if he embezzles it or fraudulently converts it to his own use, shall be guilty of a misdemeanor, and be punished as therein provided.

Viewed in the light of these suggestions, it is clear that Congress possessed the power (1) to define the offense set forth in the indictment, and that the circuit court is vested with the jurisdiction to try the offender and sentence him to the punishment which the act of Congress imposed; (2) that the defendant, under the circumstances disclosed in the record, was liable to indictment in the circuit court of the United States; (3) that the act of Congress defining the offense set forth in the indictment is a valid and constitutional law enacted in pursuance of the Constitution.

From the rulings above mentioned it very clearly appears that pension money in the hands of a guardian for the benefit of a pensioner is still under the constitutional control of the Government. If so, then it follows that the Government may direct and supervise its administration, expenditure, and disposition under the limitations and restrictions incident to the pension laws. The guardian as an individual is the agent of the United States, wholly irrespective of the duties devolved upon him by the State law, and is manifestly subject to such direction as to prevent the diversion of the pension money from inuring solely to the use and benefit of those to whom the pensions are granted.

It will be observed that, under the ruling of the Supreme Court in the Hall case (supra), the criminal jurisdiction of the circuit court grew out of the civil status of the guardian. It was predicated upon the fact that his civil status as an official under the State law of Ohio did not supersede or destroy his fiduciary relation to the United States Government. He was amenable to the criminal jurisdiction of the circuit court for the very reason that he was accountable to the civil jurisdiction of the Government.

The Commissioner of Pensions is, under the direction of the Secretary of the Interior, the lawfully constituted representative of the United States to whom guardians, as well as all other agents in pension matters, must give an account of their acts and doings. He is vested with powers which are defined in a general way in section 471, Revised Statutes, as follows:

The Commissioner of Pensions shall perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension and bounty-land laws as may be prescribed by the President.

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It will thus be seen that Congress did not attempt to define or prescribe the manner in which that official should exercise the duties of his office, but left that matter to be regulated by rules and regulations to be prescribed by the President, or by the Secretary of the Interior, who, within the legitimate scope of his administration, represents the President. Many of the duties incident to the office are quasi judicial in character, and carry with them the implied constitutional authority to direct the conduct of all ministerial agents in the execution of such judgments as legally appertain thereto. The right of Congress to grant a pension in the first place is an implied power growing out of the constitutional grant to Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the land and naval forces. The right to create the office of Commissioner of Pensions is an implied power flowing from the same source. That officer is charged with the performance of such duties, in the execution of the pension and bounty-land laws, as are prescribed by the President or the executive branch of the Government, and the power to prescribe the duties necessarily implies the power to formulate such rules and regulations as are essential to the administration of such laws. Such implied power is in existence now and will continue in force until it is destroyed by future legislation. Such power is limited only to such matters as come within the jurisdiction of the Commissioner of Pensions.

The defendant in the case of the United States *v.* Hall rested his defense mainly upon the proposition stated by the Supreme Court, as follows:

> That a guardian is a State officer, and as such is not subject to the laws of Congress in the performance of his duties.

In reply to this the court, among other things, held that the—

> Power to protect the fund from misappropriation, fraud, and unauthorized conversion to the use of another, and to secure its safe and unimpaired transmission to the beneficiary has been claimed and exercised through the whole period since Congress, under the Constitution, commenced to grant such bounties.

Who but the Commissioner of Pensions has power to "secure its safe and unimpaired transmission to the beneficiary?" If a guardian holds pension funds as a State officer, he can not be directed by Congress in its administration. Such a fund in the hands of a guardian is in transitu, as it were, and until it reaches its final destination is controllable only by the United States. When a guardian makes a proper expenditure in behalf of his ward, he does so, not as a State official, but as agent of the Government. No State court can delegate authority to such a guardian relating to the disposition of a pension fund, nor has it competent authority to direct the expenditure thereof. This necessarily follows from the fact that the guardian holds the fund, not in his official capacity as a State officer, but as an individual agent representing the Government of the United States. If, therefore, the

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Commissioner of Pensions, under the direction of the Secretary of the Interior, has no jurisdiction over a guardian holding pension money, then there is no such competent authority, and the guardian is a law unto himself, amenable to no jurisdiction.

In the case of Edward W. Moore (9 P. D., 55) the Department held that:

The words appearing in the act of August 8, 1882, "but the payment to persons laboring under legal disabilities may be made to the guardians of such persons," are not mandatory but permissive.

It was also held by the Supreme Court in the Hall case (supra) that:

The guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the fund; but if he does, he must accept it subject to the annexed conditions.

One of the conditions, as pointed out by the Supreme Court, is to the effect that the fund still remains subject to the jurisdiction of the United States. If so, then the United States must have the power, through its legally constituted official, to direct and supervise its administration. If the Commissioner of Pensions is without power to direct and control the pension fund in the hands of a guardian, the legislative safeguard above recited would in many instances prove futile and inoperative. As pointed out in your communication, guardians' accounts rendered to the Bureau of Pensions often show large and increasing accumulations of pension money, greatly exceeding the amount of bonded security. State courts have no constitutional authority to direct and control such a fund, and that condition would render the pensioner powerless to obtain redress in such a tribunal if his pension was wrongfully withheld.

There is another aspect of the subject-matter of inquiry which strengthens the view that a guardian is wholly under the jurisdiction of the Commissioner of Pensions. No State court can punish a guardian for the embezzlement of pension funds in his hands, nor can such a court take jurisdiction in a civil proceeding brought by the pensioner to recover the money so held. These propositions flow from the principles announced in the case of Waite (81 Fed. Rep., 359). Waite was a pension examiner sent out to the State of Iowa to investigate some alleged fraudulent pension claims. While there he was indicted under a statute of that State for threatening the prosecution of a pensioner. Under said indictment he was tried and convicted, and upon appeal to the supreme court of the State the judgment of the court below was affirmed. The defendant then sued out a writ of habeas corpus before the district court, which discharged him from custody on the ground that the courts of the State of Iowa had no jurisdiction in the matter. Among other things the court held as follows:

In matters committed to the sole jurisdiction of the United States, statutes of the State have no application, and a criminal prosecution for violation of a State statute can not be based upon acts done in such matters, but the determination of the rightfulness of such acts, depends wholly upon the laws of the United States, and belongs

to their courts. Accordingly held, that the statute of Iowa (Code, section 3871), providing for the punishment of one who maliciously threatens to accuse a person of a crime in order to compel him to do an act has no application to a United States pension examiner, charged with the duty of investigating fraudulent pension claims.

The court further held:

But when an officer of the United States is charged with the performance of certain duties under the law of the United States, and in the general performance thereof he does acts which it is claimed are in excess of his proper duty, which are violative of the rights of other citizens, the question is whether a prosecution therefor can be sustained in the State courts, when it is apparent that the institution and maintenance thereof may interfere with the enforcement of the laws of the United States, or with the operations of the Government. Under this aspect of the question, the point is not what the rights of individual citizens might require for their proper protection, but whether the Government of the United States, acting in the interest of the entire community, has not the right to assert that its operations within the jurisdiction conferred by the Constitution, and wherein it is supreme and paramount, can not be interfered with under the laws of the State; and to prevent such interference it must be held that an officer or agent of the United States, when engaged in the performance of his official duties, is not amenable to the laws or courts of the State in a criminal prosecution based upon acts by him done in connection with his official duties. If in the performance of these duties the officer so acts as to violate his duty to the United States, that Government and not the State is the proper party to call him to account. If the acts done are violative of the rights of individuals, a civil action for damages may be maintained or protection may be sought under the laws of the United States, and thus a remedy may be afforded to the citizen without bringing the Federal and State governments into conflict, or without unduly interfering with the operations of that Government under whose authority the officer is acting.

In said case the court further held:

It will not be questioned that the whole subject of the pensions paid to the soldiers and sailors of the United States is a matter wholly within the Federal jurisdiction, and wholly outside the plane of State control. The State can not, either by legislative enactment or by judicial action, create or deny the right to a pension under the laws of the United States, nor direct, prescribe, or control the mode of obtaining pensions, the manner of submitting evidence in support thereof, the kind or amount of evidence needed to establish a claim, or the methods to be followed by the United States in examining into claims presented, or the safeguards to be adopted to prevent frauds upon the Government. The Government of the United States has created the pension system now in force; and the whole thereof, in substance and in form of procedure, is without the plane of State control.

It will thus be seen that the court placed the civil and criminal jurisdiction of the State courts on the same plane. In pension matters the jurisdiction of the United States is everywhere not only supreme but exclusive.

This doctrine is quite as clearly announced in the case of Tennessee *v.* Davis (100 U. S., 257). Davis was a deputy collector of internal revenue, and in the discharge of his duties was attempting to seize an illicit distillery. While doing so he became engaged in a rencounter with certain persons who interfered with his actions during which he killed one of them. For this he was indicted in a State court for the

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offense of murder, whereupon he instituted proceedings under section 643, Revised Statutes, for the removal of the prosecution to the circuit court of the United States. Under a certificate of division in opinion between the judges of the circuit court the matter was taken before the Supreme Court. In that case the court, among other things held:

The provision of the Constitution declaring that the judicial power of the United States extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, embraces alike civil and criminal cases. Both are equally within that power.

In discussing the jurisdiction of the Federal courts in such matters, the court said:

As was said in Martin *v.* Hunter (1 Wheat., 363), "the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protection must be left to the action of the State court—the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.

In said case it was further held:

By the last clause of the eighth section of the first article of the Constitution, Congress is invested with power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. Among these is the judicial power of the Government. That is declared by the second section of the third article to "extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority," etc. This provision embraces alike civil and criminal cases arising under the Constitution and laws. (Cohens *v.* Virginia, 6 Wheat., 264.) Both are equally within the domain of the judicial powers of the United States, and there is nothing in the grant to justify an assertion that whatever power may be exerted over a civil case may not be exerted as fully over a criminal one. And a case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit.

Your communication invited an expression of opinion as to whether the act of March 2, 1895, embodies the law of distribution relating to the accrued pension of a deceased pensioner, especially as to the fund in the hands of a guardian unexpended at the time of such decease.

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Said act read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the twenty-eighth day of September, eighteen hundred and ninety-two, the accrued pension to the date of the death of any pensioner, or of any person entitled to a pension having an application therefor pending, and whether a certificate therefor shall issue prior or subsequent to the death of such person, shall, in the case of a person pensioned, or applying for pension on account of his disabilities or service, be paid, first, to his widow; second, if there is no widow, to his child or children under the age of sixteen years at his death; third, in case of a widow, to her minor children under the age of sixteen years at her death. Such accrued pension shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payment of the debts of said estate in any case whatsoever, but shall inure to the sole and exclusive benefit of the widow or children. And if no widow or child survive such pensioner, and in the case of his last surviving child, who was such minor at his death, and in case of a dependent mother, father, sister, or brother, no payment whatsoever of their accrued pension shall be made or allowed except so much as may be necessary to reimburse the person who bore the expense of their last sickness and burial, if they did not leave sufficient assets to meet such expense. And the mailing of a pension check, drawn by a pension agent in payment of a pension due, to the address of a pensioner shall constitute payment in the event of the death of a pensioner subsequent to the execution of the voucher therefor. And all prior laws relating to the payment of accrued pension are hereby repealed. (28 Stat., 964.)

The act is undoubtedly the law of distribution and needs no construction as it affects accrued pensions. It remains only to be determined whether a fund that has been paid to a guardian, and is in his hands at the date of the pensioner's death, is an accrued pension. As a general rule an accrued pension is a fund which is due the pensioner but which has not yet been severed from the general fund in the Treasury or in the designated depository upon which the pension agent would draw his check for payment. It is not that condition, however, which makes such a fund an accrued pension. All funds which have accumulated by operation of law, and have not been paid to the pensioner or expended in accordance with law in his behalf, are certainly in the nature of accrued pensions. If, therefore, an unexpended fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner it must be an accrued pension. The pensioner has no better title to such a fund than if it was yet in the Treasury. In the one case the fund is in the hands of a depositary, and in the other case it is in a depository. There can be no essential difference in the nature of an accrued pension yet in the Treasury and a pension fund in the hands of a guardian, unless the payment to the guardian is, in legal contemplation, a payment to the pensioner. But in the Hall case, above mentioned, the defendant was held to be amenable to the criminal jurisdiction of the United States courts upon the ground that the payment to him was not a payment to the pensioner or to the guardian as such, but to an individual as a custodian or depositary. In this respect the status of the defendant was differentiated from all

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other cases in which a legally constituted guardian comes into possession of goods which belong to his ward. The essential difference seems to be that a pension fund, being a donation, is treated as being always in the possession of the Government until it reaches the hands of the beneficiary, or in case of a person under disability until it has been properly expended in his behalf. The payment of an accrued pension to a guardian does not alter the nature or character of the fund; it is still an accrued pension under the jurisdiction of the Government.

Attorney-General Garland, in construing the term accrued pension, held that:

> The term "accrued pension" as used in section 4718, Revised Statutes, means the amount of money unpaid by the Government to which a pensioner or a person who had a valid claim for pension pending was entitled at the time of his death. (19 Op., 1.)

It will be thus seen that in the opinion of the Attorney-General the term "accrued pension" is synonymous with the term unpaid pension.

In the act of June 30, 1890, is the following provision:

> *Provided further*, That hereafter whenever a pension certificate shall have been issued and the pensioner mentioned therein dies before payment shall have been made, leaving no widow and no surviving minor children, the accrued pension due on said certificate to the date of the death of said pensioner may, in the discretion of the Secretary of the Interior, be paid to the legal representatives of said pensioner. (26 Stat., 187.)

In this proviso the term "accrued pension" is manifestly used in the sense of unpaid pension. Before the proviso was repealed by the act of March 2, 1895, the Secretary of the Interior, in the exercise of his discretion, was authorized to pay to the legal representatives of a deceased pensioner all unpaid amounts due from the date of the original application.

Suppose that an insane pensioner, having a guardian with pension funds in his hands, should die leaving a widow, would she have to make application for such fund as an accrued pension, or would she be relegated to the statutes of distribution under the laws of the State in which she and the pensioner resided? If such a pensioner should die, leaving no widow or child, would that fund revert to the Government or go to his legal representatives? If such a fund is a portion of the assets of his estate, then, of course, it would be disposed of under the laws of the State; but if not, then it would be disposed of as an accrued pension. But the act of 1895, above recited, declares that such accrued pension shall not be considered a part of the assets of the estate of such deceased person, nor be liable for the payment of the debts of said estate in any case whatever, but shall inure to the sole and exclusive benefit of the widow or children. In many cases Congress has passed laws providing that pension money shall not be

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transferable or subject to attachment, levy, or seizure, even after it has been received by the agent, attorney, or guardian. Such a provision is contained in the fourth section of the act of May 15, 1828, passed for the relief of the officers and soldiers of the Revolution (4 Stat., 270). Ever since the Revolution, in which our pension system had its origin, pensioners have in certain aspects been "wards of the United States," and that relation continues so long as their pensions remain in the hands of agents or guardians. In the Hall case the Supreme Court, quoting from a Massachusetts authority, held:

> It is undoubtedly competent for the United States, said Judge Hoar, to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. (Kellogg r. Wait and Trustee, 12 Allen (Mass.), 530.) But the court in that case held that the rule did not apply to the money after the same had passed into the hands of the pensioner, which is a question that does not arise in this case.

From what has been said arises the necessary legal conclusion that the United States has supreme and exclusive jurisdiction and control over the civil and criminal conduct of its officers and agents while engaged in the discharge of duties devolved upon them by Federal laws. A pension fund in the hands of a guardian will not be treated as having passed from such control until it has reached the beneficiary and become merged into his estate.

After a careful consideration of the matters presented in your communication, I have arrived at the conclusion that the Commissioner of Pensions is invested with the discretionary powers enumerated therein as necessary to the proper administration of the pension laws. Guardians holding pension funds are subject to your direction, both before and after the death of the ward or insane pensioner.

You will take such action as may be deemed appropriate under the views herein expressed.

DESERTION—HONORABLE DISCHARGE—DROPPING.

HENRY P., ALIAS PATRICK H. BURNS.

A soldier is pensionable for a disability incurred subsequent to the expiration, by limitation, of a term of enlistment from which he had deserted and was never discharged, notwithstanding the fact that the second contract of enlistment was entered into prior to the expiration of the first term of enlistment, provided said second term of enlistment be faithfully performed and completed, and be not avoided by the United States.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 4, 1901.

Your communication of May 4, 1901, accompanying the papers in the case (certificate No. 294884) of Henry P. Burns, alias Patrick H.

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Burns, late a private in Company B, Thirty-fifth New York Volunteer Infantry, and Company M, Fifth New York Volunteer Heavy Artillery, and inviting the attention of this Department to certain supposed incongruities and an apparent conflict between the decision of this Department of April 27, 1901 (ante, p. 332), rendered on the appeal of said Burns from the action of the Pension Bureau dropping his name from the rolls, and reversing said action and directing the restoration of his pension, and the decision of the Department, rendered June 21, 1898, in the case of John Norton (9 P. D., 382), has been most carefully considered.

Your communication points out clearly and distinctly the apparent conflict deemed to exist between the two departmental decisions above referred to, and is as follows:

DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS,
Washington, D. C., May 4, 1901.

The Honorable SECRETARY OF THE INTERIOR.

SIR: Herewith I have the honor to return decision of April 27, 1901, in claim (certificate 294884) of Henry P. Burns, alias Patrick H. Burns, Company B, Thirty-fifth New York Volunteer Infantry, and Company M, Fifth New York Volunteer Heavy Artillery, and the papers in the case, together with the case of John Norton (certificate 255355) in which was rendered a decision, June 21, 1898, covering the point involved in the Burns case.

The decision in the Norton case has been closely followed in the practice of this Bureau since the date of its promulgation, and, inasmuch as the decision in the Burns case appears to differ in principle from that in the Norton case in a very important point, it is deemed proper to bring the matter to your attention.

Paragraph 4 of the syllabus in the Norton decision is as follows: "If the disability was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment."

The syllabus of the Burns decision ends thus:

"*Held:* That appellant's contract of enlistment in Company B, Thirty-fifth New York Volunteer Infantry, having expired by limitation long prior to the incurrence of the injury for which he was pensioned, the offense of desertion terminated with said contract of enlistment, and at the time of the incurrence of said injury he was no longer in desertion, but was in line of military duty under his second enlistment, and occupied a pensionable status, and the action dropping him from the rolls was error. (See case of John Norton, 9 P. D., 382.)"

The facts in the Norton case are: He enlisted in Company H, Ninth Massachusetts Volunteer Infantry, April 11, 1861, to serve for three years; was detached to Battery D, Fifth United States Artillery, and deserted therefrom January 21, 1863. He enlisted in Company B, First District of Columbia Volunteer Cavalry, July 31, 1863, and was discharged May 3, 1865. He was pensioned for gunshot wound of head, incurred, as shown by the record, June 23, 1864, twelve days after the expiration of the term of his original enlistment, and was dropped because of desertion from a prior service in 1898, having been last paid to December 4, 1897. Norton died April 26, 1898.

In the Burns' case it appears that the soldier enlisted for two years (according to the Volunteer Army Register), May 7, 1861, in Company B, Thirty-fifth New York

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Volunteer Infantry; deserted prior to February 28, 1862 (exact date not of record); enlisted in Company M, Fifth New York Volunteer Heavy Artillery, August 7, 1862, for three years, and was discharged June 26, 1865. He was pensioned for injury of head and back, alleged to have been incurred July 5, 1864, his allegation being sustained by considerable evidence, and was dropped in 1897 (last paid to January 4, 1897), on ground of desertion from a prior service.

At the date of dropping he had a claim pending for additional disability—rheumatism—said to have been incurred in the winter of 1862–63, and supported by considerable evidence.

As before stated, the decision in this case denotes as error the Bureau's action of dropping because of prior desertion, for the reason that the prior contract of enlistment from which claimant was never discharged had "expired by limitation long prior to the incurrence of the injury for which he was pensioned," leading irresistibly to the conclusion that it is the relation of the date of incurrence of disability to that of expiration of the term of enlistment from which there was no discharge, which is to govern the status of the soldier as pensionable or not. In the Norton decision weight is laid upon the relation borne by the date of the second enlistment to the expiration of the term of enlistment from which there was no discharge, the closing paragraph of that decision being as follows: "In view of the foregoing, I should say that Mr. Norton, having enlisted in the First District of Columbia Cavalry while in desertion from Ninth Massachusetts Infantry, and while he was still a member of that organization, was not in line of duty as a soldier when he is alleged to have received the disability for which pension is claimed, being at the time a deserter from the Ninth Massachusetts Infantry."

In both cases the second-enlistment contract was entered into before the term of the first enlistment, from which there was no discharge, had expired, and in both cases the disability was incurred subsequent to the date of expiration by limitation of the first contract of enlistment.

In other words, the two cases appear, in the view of the Bureau, to be in the same category, and to come under paragraph 4 of the syllabus of the Norton decision.

Inasmuch as that decision is quoted as a precedent in the Burns decision, it does not appear that the Department overrules or modifies it in any way; nevertheless, as the former denied the right of the soldier to his pension and the latter directs his restoration to the roll, the Bureau seems justified in asking further guidance in dealing with the question of line of duty in cases wherein the disability was incurred in a second service, there having been no discharge from the first.

In this connection note is made of the decision rendered November 25, 1898, in the case of the widow of John Sullivan, late of Company H, Nineteenth Kentucky Volunteer Infantry, and Company D, Second Ohio Volunteer Heavy Artillery. This claim was rejected after the receipt of the further report from the War Department requested in the decision, on the ground that the fatal disease was not incurred in line of duty; the original contract of enlistment for three years, from October 19, 1861, from which soldier deserted September 2, 1862, not expiring until nearly six months after soldier's discharge from second service, in which the fatal disability was incurred.

Concisely stated, the point to be settled is this: Is soldier pensionable if disability was incurred subsequent to the expiration by limitation of the term of enlistment from which he was never discharged, or is he pensionable only in case the second contract of enlistment was entered into subsequent to the expiration of such prior term of service?

Very respectfully, H. CLAY EVANS, *Commissioner.*

The decision in the case of Burns was based on the interpretation placed by this Department upon the decision in the case of Norton (*supra*), and this latter decision was cited and relied upon as authority

for the conclusion arrived at in the Burn's case. Inasmuch, however, as it now appears that the material facts in the two cases are precisely similar, and, in the one case, Norton was denied a pension upon the ground that he was in desertion at the time he incurred his disability; and in the other Burns was directed to be restored to the rolls for the reason that the contract of enlistment from which he had deserted was shown to have expired by limitation prior to the incurrence of the disability on account of which he had been pensioned, and therefore he could not be considered as in desertion at the time of its incurrence under the ruling in the Norton case, it becomes important, as suggested by you, to carefully consider these two decisions, and ascertain, if possible, whence this evident conflict and inconsistency between the conclusion announced in each arose, with a view that same may be reconciled, and the decisions of the Department on this subject be made uniform and harmonious.

As has been well and concisely stated in the conclusion of your communication, the question to be determined is this: Was it the intention and purpose of the decision in the Norton case to hold that a soldier was pensionable under the provisions of the general pension law if his disability was incurred during a second term of service at a date subsequent to the expiration by limitation of a prior contract of enlistment from which he had deserted and was never discharged; or was it the intention of said decision to hold that he would occupy a pensionable status only in the event that the second contract of enlistment, in which the disability was incurred, was entered into subsequent to the expiration by limitation of the prior term of service from which he had deserted?

The decision in the case of Norton contained a carefully considered discussion of the effect of a record of desertion upon the pensionable status of soldiers under the provisions of the pension laws, and an exhaustive citation and consideration of the previous rulings and decisions of this Department on that subject. The conclusions of the Department were therein announced in five general propositions or rules, the fourth one of which is cited in your foregoing communication, and it was this fourth rule or proposition which is also cited and relied upon, in the decision in the case of Burns, to sustain the conclusion therein arrived at.

This fourth rule declares the law to be as follows:

> If the disability was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command, in violation of his former contract of enlistment.

In your foregoing communication you state:

> In the Norton decision weight is laid upon the relation borne by the date of the

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second enlistment to the expiration of the term of enlistment from which there was no discharge, the closing paragraph of that decision being as follows:

"In view of the foregoing, I should say that Mr. Norton, having enlisted in the First District of Columbia Cavalry while in desertion from the Ninth Massachusetts Infantry, and while he was still a member of that organization, was not in line of duty as a soldier when he is alleged to have received the disability for which pension is claimed, being at the time a deserter from the Ninth Massachusetts Infantry."

Although the language used in said fourth rule and in the above-cited concluding paragraph of the Norton decision is somewhat ambiguous, and would, if standing alone, give color to the interpretation suggested by you, yet, when it is considered and read in connection with the body of said decision and the argument and reasoning therein contained, upon which said fourth rule and the conclusion announced in the closing paragraph of the Norton decision is based, it would seem to be clear that it was not the "relation borne by the date of the second enlistment to the expiration of the term of enlistment from which there was no discharge" to which weight was intended to be given, but that, in the mind of the writer of said decision, it was the relation of the date of incurrence of the disability for which pension is claimed to the date of expiration of the term of enlistment from which there was no discharge, which is the material and controlling factor in determining the pensionable status of the soldier.

This would seem to follow inevitably from the fact that the whole argument and discussion in the Norton decision of the particular phase of the general subject of desertion, which is suggested by your communication and embraced in the Burns decision, centers around and is based upon the principle, laid down by Attorney-General Taft (15 Op., 157), that the obligation to render military service depends on the contract of enlistment, and, necessarily, ceases therewith; and the offense of desertion must be deemed to terminate at the same time. In the words of the Attorney-General:

That offense may be viewed as continuing up to the end of the term of engagement, but not beyond.

From this principle was deduced the view and the holding that a soldier could not be held to be in desertion, or out of the line of duty by reason of his absence from his proper command without leave, after the expiration, by limitation, of the term of enlistment from which he had deserted; and this view is strenuously urged in the Norton decision as the sole and only basis and foundation for the conclusion of law announced in the fourth rule, or general proposition, above referred to. Nowhere in the discussion of this subject in said decision is it argued or even intimated that the soldier would be held to be still in desertion, or out of the line of military duty and not pensionable, simply for the reason that at the date of his reenlistment he was a deserter from a prior term of enlistment, provided it appear that at the date of the incurrence of the disability for which pension

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is claimed his former contract of enlistment had expired by limitation. On the contrary, the very gist and foundation of the argument and reasoning advanced in said decision for the conclusions therein announced is to the effect that there could be no desertion from a particular term of enlistment after the expiration by limitation of the contract of enlistment to serve during said term; that the offense of desertion terminated with the expiration of the contract, and, there then being no existing legal obligation to perform military service, the soldier could not be held to be out of the line of duty by reason of his absence without leave from his proper command.

This clearly appears from the following language used in said decision (9 P. D., 390):

> Nor do I think a soldier would be pensionable for a disability contracted during a period when he was in desertion from a former enlistment, he having enlisted subsequent to such desertion in violation of the Articles of War, because while absent in desertion he was not in the line of duty, it being held that desertion is a continuing offense, and may be committed from day to day up to and including the day on which his term of enlistment expires. (15 Op. Atty. Gen., 157).

Here it is plainly stated that a soldier, whose enlistments were similar to those of Norton and Burns, would not be pensionable for a disability incurred during the time he was in desertion from his former enlistment for the sole reason that he would not be in line of duty while thus absent in desertion, and the ground for this conclusion is distinctly stated to be that the desertion from his prior enlistment was a continuing offense which might be committed from day to day up to and including the day on which said term of enlistment expired, and the opinion of the Attorney-General, holding that desertion and the obligation to perform military service terminated with the expiration of the contract of enlistment, is cited as authority for the conclusion announced. Consequently there is no room for doubt or question as to the intent and meaning of this language, the irresistible and necessary implication from which is, that if the disability had been incurred after the expiration of the prior contract of enlistment the soldier would then have been no longer in desertion nor out of the line of duty because of absence from his proper command in desertion, and pension on account thereof could not be denied him upon the grounds set forth, irrespective of the fact that at the date of his second enlistment he was a deserter from a prior term of enlistment.

If the Norton decision be interpreted to hold, as suggested in your communication, that the pensionable status of a soldier depends, not upon the fact that the disability for which pension is claimed was incurred in a second term of service subsequent to the expiration by limitation of a prior term of service from which there was no discharge, but solely upon the fact that the second contract of enlistment was entered into subsequent to the expiration of the prior contract of enlistment, then the language used in said fourth rule announced in

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said decision is irreconcilably in conflict with itself, and the concluding paragraph of said decision is a complete non sequitur. In the fourth rule it is stated that if the disability for which pension is claimed—

was incurred in the service under a subsequent enlistment, while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

It does not seem to be open to question that in order to bring a given case within this rule the disability must have been incurred while the claimant was in a state of desertion "from a prior enlistment which had not terminated prior to such reenlistment;" but, according to the argument and the authorities from which this rule was deduced, he could not be in desertion "from a prior enlistment which had not terminated prior to such reenlistment" after the expiration by limitation of such prior enlistment. Again, the ground and reason given in said rule for rejecting the claim is, that, being in desertion, the disability was not incurred in line of duty, "but while the claimant was absent from his proper command in violation of his former contract of enlistment." This rule, however, is based wholly upon the proposition that desertion and the obligation to render military service terminate with the expiration of the contract of enlistment. How, then, could a claim be rejected under this rule if the disability was not incurred in the second service until after the expiration of the prior service, and at a time when, according to the indisputable holding of the decision, and the authorities therein cited in support of it, the claimant was neither in desertion from his prior service nor absent from his proper command in violation of his former contract of enlistment? If the words, "while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment," be interpreted to mean that because of the fact that at the date of his reenlistment his former contract of enlistment was in force, and he was in a state of desertion, he would still be in desertion from said prior service, and out of the line of duty because of absence from his proper command in violation of his former contract of enlistment, after the expiration of said former contract of enlistment, and during the whole time of his second service subsequent thereto, then these words would give said rule a meaning not only absolutely inconsistent with the whole argument of said decision, but also irreconcilable with the only grounds stated by the rule itself for the rejection of the claim.

It is clear that said rule is, by its terms, wholly inapplicable to a case where the disability was incurred in a second term of service after the expiration by limitation of a prior term of service from which the

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claimant had deserted, irrespective of the fact that such prior service had not terminated at the date of reenlistment in the second service.

The concluding paragraph of the Norton decision is as follows:

In view of the foregoing, I should say that Mr. Norton having enlisted in the First District of Columbia Cavalry while in desertion from Ninth Massachusetts Infantry, and while he was still a member of that organization, was not in the line of duty as a soldier when he is alleged to have received the disability for which pension is claimed, being at the time a deserter from the Ninth Massachusetts Infantry.

Although the first part of said paragraph, taken alone, would seem to indicate that Norton was not in the line of duty as a soldier at the time of the alleged incurrence of his disability for the reason that he had "enlisted in the First District of Columbia Cavalry while in desertion from the Ninth Massachusetts Infantry and while he was still a member of that organization," the reason given in the latter part of said paragraph for the holding that he was not in the line of duty when his disability was incurred is plainly stated to be that he was "at the time a deserter from the Ninth Massachusetts Infantry." Now, "in view of the foregoing" discussion and argument in said decision, it does not follow by any means that Norton was not in the line of duty when his disability was incurred, solely by reason of the fact that when he enlisted in the First District of Columbia Cavalry he was in desertion from the Ninth Massachusetts Infantry and was still a member of that organization. On the contrary, if the facts in his case are, as stated in your communication, that his contract of enlistment in the Ninth Massachusetts Infantry had expired by limitation prior to the date upon which he incurred his disability, then he could not, "in view of the foregoing" holding and argument of said decision, have been "at the time a deserter from the Ninth Massachusetts Infantry," and the reason stated for the decision rendered falls to the ground.

It is impossible to avoid the conclusion that the decision in the Norton case was written upon the theory that Norton incurred his disability prior to the expiration of his contract of enlistment in the Ninth Massachusetts Infantry, and at a time when he was in desertion from and still a member of said organization under said contract; since, as has been demonstrated in the foregoing, the statements and arguments advanced in, the conclusion reached, and even the judgment rendered by said decision are utterly irreconcilable with any other theory. It is true, as pointed out in your communication, that the facts in the Norton case, as they now appear, are similar to the facts in the case of Burns, and that, as a matter of fact, Norton did incur his disability after the expiration of his term of enlistment in the Ninth Massachusetts Infantry; but, it will be observed from an examination of the papers in the Norton case, that this fact did not affirmatively appear

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on the face of the reports of the War Department, or from the evidence in the case at the date when said decision was rendered, and that it was only very recently, nearly three years after the rendition of said decision, that any evidence was filed in said case which distinctly and definitely disclosed the length of Norton's first term of service, or distinctly tended to show that it had expired by limitation prior to the incurrence of his disability.

Although it might have been discovered by investigation dehors the record then in the case, or have been assumed from the date of Norton's enlistment in the Ninth Massachusetts Infantry, that his first contract of enlistment was for a term of service of three years and expired at the end of that period, the only information on this point contained in the reports of the War Department or in the evidence filed in the case prior to the rendition of the decision was the mere statement of the date of his enlistment in said organization and the date of his desertion therefrom, and there was nothing whatever to call particular attention to the fact that his first contract of enlistment had expired when his disability was incurred. It was not until May 1, 1901, after the rendition of the decision in the case of Burns, and more than three years after the death of Norton, that the Pension Bureau first called upon the War Department for definite information on this subject, and it was on May 3, 1901, in reply to this inquiry, that the War Department, for the first time in the history of said case, reported that Norton's first contract of enlistment was for a term of three years, and the fact distinctly and affirmatively appeared from the evidence in said case that said contract had expired by limitation a few days prior to the incurrence of the disability for which pension was claimed. If this fact had been apparent, or had been recognized as an existing fact in the adjudication of Norton's case or at the time the decision was rendered therein on appeal, there would certainly have been no necessity to have called upon the War Department at this late date to obtain definite and certain information on the subject.

That the conclusion in the Norton decision was reached under a misapprehension of the actual facts of the case, and was based upon the theory that Norton's first contract of enlistment was still in force, and he was in desertion from the Ninth Massachusetts Infantry at the date he incurred his disability, also, clearly appears from the fact that in the decision in the case of the widow of John Sullivan (10 P. D., 55), rendered less than six months after the Norton decision, and by the same Assistant Secretary of this Department who rendered the Norton decision, exactly the same interpretation was given to the Norton decision as is given in the decision in the case of Burns. In the case of Sullivan the material facts are precisely similar to those in the case of Burns. Sullivan was shown to have enlisted a second time, prior to the expiration of a former contract of enlistment and while in desertion from another organization. His death was alleged to have

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resulted from disease contracted in line of duty during his second term of service, and the claim of his widow for pension was rejected upon the ground that he was a deserter from his first term of enlistment. In the decision rendered on appeal from this action it was distinctly and positively held, upon the basis and authority of the holding in the decision in the case of Norton, which was therein cited and referred to, that if it should appear that the soldier incurred the disability causing his death during his second service after the expiration by limitation of his first contract of enlistment, "he could not be held as having been in desertion at that time, but in line of duty." And it was furthermore stated therein that if it should be determined from the evidence that Sullivan's death was caused by any "disability contracted in line of duty during his second term of military service after the legal expiration of his first term of enlistment, then his desertion from said first term of service would be no bar to the grant of pension to his widow."

In Sullivan's case, as was true of the Norton case when it was adjudicated and decided on appeal, the reports of the War Department and the evidence failed to indicate the length of the first term of enlistment, or whether, or not, it had expired at the date of the incurrence of the disability alleged as basis for pension, and, therefore, the rejection of the claim solely upon the ground that the soldier was shown to have been a deserter from his first service was reversed, and the case was remanded with instructions to call upon the War Department for definite information upon this point, and to readjudicate the claim in accordance with the above cited views, which were declared to be the ruling and holding of the Department in the case of Norton.

This decision in the case of Sullivan amounts, practically, to a contemporaneous judicial interpretation by this Department of the decision in the case of Norton, and would seem to settle, beyond all cavil or controversy, what the Department intended to hold in the Norton case, and what meaning the official who rendered said decision intended to convey by the language therein used.

The only other ground upon which a rejection of the claim of Burns because of his desertion from his first term of enlistment could be maintained would be, that, being a deserter at the date of his second enlistment, and said second enlistment having been in violation of the Articles of War, his second contract of enlistment was an illegal contract, and his second service thereunder was throughout an illegal service, and he was out of the line of military duty and could not occupy a pensionable status at any time during its continuance. This particular phase of the subject was, very naturally, not discussed or alluded to at all in the decision in Norton's case for the reason that it had been clearly pointed out in the previous decision in the case of George Lessor (8 P. D., 114), rendered March 30, 1896, and which was reviewed at length, and partially overruled in the Norton decision, that

it was held by the War Department, in a case submitted to it by the Pension Bureau for an opinion on this very point, that the validity of a second term of enlistment while the first, by reason of desertion, is yet unfinished—

Is voidable by the United States, but not void, or, in other words, that it is valid until avoided by the United States, so that if it be not avoided before its expiration it becomes a complete, legal term of service.

This question as to the validity of a second term of military service, entered upon while in desertion and in violation of the Articles of War, if faithfully performed and not avoided by the United States prior to its expiration, is a question of military law, and peculiarly within the jurisdiction and province of the War Department to decide, and its decisions and holdings on such questions have always been considered binding and conclusive on this Department. This fact was recognized in the decision in Lessor's case (*supra*), and the Department therein distinctly abandoned the position that the soldier could be considered as out of the line of duty and not pensionable during the whole period of his second enlistment, upon the ground of the illegality of his second contract of enlistment at the date of its inception, but based its holding solely upon the ground that, although the second service was not avoided by the United States and became a valid and legal military service upon its faithful completion by the soldier, he was still left in the status of a deserter from his first term of enlistment during his entire subsequent service, and was, therefore, not pensionable. It was only this holding of the Lessor decision that was discussed and overruled in the decision in the Norton case, and no dissent or disapproval was intimated or expressed therein to the acceptance by the Lessor decision of the ruling of the War Department above cited.

The foregoing ruling of the War Department still expresses, so far as this Department is informed, the authoritative and controlling views of that Department on this subject, and if it be accepted, as it must be, it is utterly destructive of the position that the claim of a soldier could be rejected solely upon the ground that his second term of service had been entered upon at a date prior to the expiration by limitation of his first contract of enlistment and when he was in desertion from another organization, and was, therefore, illegal in its inception, provided said second term of service was faithfully performed and completed, and never avoided by the United States.

Although it was not necessary under the ruling in the Norton case to have done so, this branch of the subject was referred to in the decision in the case of Burns, and the ruling of the War Department was cited and applied to the facts of his case for the purpose of showing that he could not have been held to be out of the line of military duty at the time of incurring his disability for the reason that his second term of service was an illegal service.

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In view of these considerations the Department is fully satisfied that the interpretation given to the Norton decision (supra), by the decision in the case of the widow of John Sullivan (supra), and in the decision in the case of Burns, to which you refer, is the true intent and meaning of said Norton decision, and correctly expresses and sets forth the law governing such cases.

The Department therefore holds, in answer to the question with which your communication closes, that a soldier is pensionable if his disability was incurred subsequent to the expiration by limitation of a term of enlistment from which he had deserted and was never discharged, notwithstanding the fact that the second contract of enlistment was entered into prior to the expiration of the first term of service, provided said second term of enlistment be faithfully performed and completed, and be not avoided by the United States.

The decision in the case of Burns will, therefore, be adhered to, and the Norton decision will be interpreted and construed to hold as has been herein indicated.

DESERTION—HONORABLE DISCHARGE—RESTORATION.

LEWIS RANKIN.

It appearing from the official record of this appellant's military service, and from the other evidence in the case, that at the date he incurred the disabilities in the service on account of which he was formerly pensioned, he was in desertion from a prior term of service and was at said time absent from his proper command without leave and not in the line of duty, he is not entitled to be restored to the pension roll under the present rulings and decisions of this Department. See cases of John Norton (9 P. D., 382), and widow of John Sullivan (10 P. D., 55).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 6, 1901.

Lewis Rankin, late a private in Company K, Seventh Illinois Volunteer Infantry; a second lieutenant in Company B, Fifty-sixth Illinois Volunteer Infantry; a private in Company D, One hundred and second Illinois Volunteer Infantry, and Company G, Fifty-fourth Illinois Volunteer Infantry, was on August 15, 1882, allowed a pension under the provisions of the general pension law, and was last paid at the rate of $14 per month, for shell wounds of left hand, arm, and side, and a cicatrix, result of erysipelas of right arm. On June 12, 1896, said pensioner was after due and legal notice dropped from the pension roll and his said pension terminated, upon the ground that it was shown by the official records of the War Department that he was a deserter from Company B, Fifty-sixth Illinois Volunteer Infantry, which charge of desertion the War Department declined to remove.

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From the action dropping the pensioner from the roll, as aforesaid, an appeal was taken on September 13, 1898.

The official record of the appellant's military service during the war of the rebellion shows that he first enlisted under the name of William L. Rankin on April 22, 1861, as a private in Company K, Seventh Illinois Volunteer Infantry, and served therein until July 25, 1861, when he was mustered out and discharged the service with said company. He enlisted a second time under the same name on November 6, 1861, and was enrolled and mustered in as a second lieutenant of Company B, Fifty-sixth Illinois Volunteer Infantry, on February 27, 1862, and served therein as such until August 5, 1862, when he deserted and never afterwards returned to or was discharged from said organization. He enlisted a third time under the name of Lewis Tupper on August 21, 1862, as a private in Company D, One hundred and second Illinois Volunteer Infantry (while in desertion from, and while still a member of Company B, Fifty-sixth Illinois Volunteer Infantry), and served therein until May 5, 1863, when he was discharged therefrom on a surgeon's certificate because of disability. He enlisted a fourth time under the name of Lewis Rankin, and while still in desertion from his second term of service, on March 29, 1864, as a private in Company G, Fifty-fourth Illinois Volunteer Infantry, and served therein until October 15, 1865, when he was mustered out with said company and finally discharged the service.

On September 17, 1895, the War Department reported:

> That an application for removal of the charge of desertion, and for an honorable discharge in the case of William L. Rankin, as of Company B, Fifty-sixth Illinois Infantry Volunteers, has been denied. The case appears to be one in which no relief can be afforded under existing law.

On February 19, 1890, the appellant, testifying before a special examiner, admitted under oath his desertion from Company B, Fifty-sixth Illinois Volunter Infantry, shown by the foregoing official record, as follows:

> I was in the Fifty-sixth, and I wanted to resign and my resignation was not accepted. I deserted and joined the One hundred and second as a private under an assumed name.

It has been urged that the fact of the appellant's desertion from his second term of service was in evidence in the case, and fully known to the officials of the Pension Bureau at the date his claim for pension was admitted and his pension originally allowed him, and that said pension had been allowed under and in accordance with the decisions of this Department, and the views and practice of the Pension Bureau, relative to the effect of such desertion upon his pensionable status, then in force and prevailing; that he had been dropped from the rolls under and by virtue of a decision rendered by a subsequent administration of this Department, which overruled the decisions in accordance with which his claim had been admitted, and announced a different

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construction of the law, contrary to and in violation of the well-settled ruling and practice of the Department in such cases, that where a claim for pension had been adjudicated, and pension allowed in accordance with the views and decisions of the Department in force at the time, such adjudication would not, in the absence of evidence of fraud or mistake, be disturbed or set aside by a subsequent administration merely because of a change of view and opinion as to the construction of the law, and therefore he should be restored to the roll. This argument is self-destructive, however, in this case, since the action dropping the appellant from the rolls having been taken under a former administration, and in accordance with a decision of the Department and a construction of the law then in force and prevailing, which has also since been overruled and modified, the same reason could be urged with just as much force against disturbing said action, as it is urged for restoring the appellant to the roll.

The real and material question to be considered and determined on this appeal is, however, whether or not this appellant would be entitled to restoration to the pension roll under the present views and decisions of this Department, for it would certainly be most inconsistent in the Department to direct his restoration to the roll when, under precisely similar facts and circumstances, it would affirm the rejection of a claim for original pension on the ground of desertion.

This appellant was dropped from the roll under and in accordance with the decision and holding of this Department in the case of George Lessor (8 P. D., 114), rendered March 30, 1896, wherein it was held:

> That a claimant, against whom there stands a charge of desertion under an enlistment for service in the war of the rebellion, which charge the War Department declines to remove, has no title to pension under any existing law on account of disability incurred in said war, or service performed therein.

This ruling and decision was subsequently, however, partially overruled and very greatly modified by the decision rendered June 21, 1898, in the case of John Norton (9 P. D., 382), wherein the whole subject of desertion, in its relation to and bearing upon pensions and claimants for pension, was thoroughly and exhaustively discussed and carefully considered, and four general propositions or rules were deduced and laid down which have since guided and controlled the adjudication of claims for pension in which a charge of desertion appeared standing against the claimant.

The fourth one of said rules, which is the one applicable to the facts of the present case, is as follows:

> If the disability was incurred in the service under a subsequent enlistment while the claimant was a deserter from a prior enlistment which had not terminated prior to such reenlistment, the claim should be rejected on the ground that the disability was not incurred in the line of duty, but while claimant was absent from his proper command in violation of his former contract of enlistment.

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This appellant was mustered into his second term of service as a commissioned officer. His engagement and obligation to serve as such was, therefore, binding on him as long as the organization in which he was commissioned and mustered, the Fifty-sixth Illinois Volunteer Infantry, was in existence, and it would not expire by legal limitation until the muster out and discharge of said regiment, unless sooner terminated by his resignation or discharge for disability. The official records of the War Department show that the Fifty-sixth Illinois Volunteer Infantry was not mustered out of the service until August 12, 1865. Consequently, the appellant's engagement to render military service therein as a commissioned officer of Company B of that regiment did not expire by legal limitation until that date. As shown by the official record of his military service, as well as by his own admission, he deserted from said company and regiment on August 5, 1862, and enlisted the third time on August 21, 1862, and the fourth time on March 29, 1864. He was, therefore, during the whole period of his third enlistment and service in Company D, One hundred and second Illinois Volunteer Infantry, and during his fourth enlistment and service in Company G, Fifty-fourth Illinois Volunteer Infantry, up to August 12, 1865, "a deserter from a prior enlistment which had not terminated prior to such reenlistments," and was not in the line of duty but "absent from his proper command in violation of his former contract of enlistment."

The disabilities for which the appellant was formerly pensioned were alleged and proved by him to have been incurred during his fourth and last term of enlistment, while serving in Company G, Fifty-fourth Illinois Volunteer Infantry, all during the month of August, 1864. Hence they were incurred while this appellant was a deserter from a prior enlistment which had not terminated prior to his reenlistments, and were not incurred by him in line of duty, but while he was absent from his proper command in violation of his former contract of enlistment. It is manifest that the facts in the appellant's case bring it squarely and within the above-cited fourth rule laid down in the Norton decision (supra), and that in accordance with said rule a claim for pension based upon said disabilities would be rejected upon the ground that they were not incurred in line of duty and not pensionable. Therefore, he could not now be restored to the roll on account of disabilities thus incurred, since it is evident, in view of the present decisions of the Department, he was improperly and erroneously pensioned therefor in the first instance.

The action dropping the appellant from the rolls is, therefore, hereby affirmed, and restoration of the pension he was formerly receiving is denied him for the reasons herein set forth.

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DESERTED WIFE—ACT MARCH 3, 1899—EVIDENCE.

MARY A. ROTHERY *v.* HENRY N. ROTHERY.

The word desertion in the act of March 3, 1899, is used in its general legal sense and means the willful withdrawal of the pensioner from his wife, or his voluntary refusal to renew a suspended cohabitation, without legal justification. Rothery *v.* Rothery (11 P. D., 77); Richards *v.* Richards (ibid., 90); Henry N. Rothery (ibid., 255).

The evidence in this case shows that pensioner did not willfully desert claimant, but that his separation from his wife is due to her own conduct toward him, and is in accordance with her wish.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 8, 1901.

Mrs. Mary Ann Rothery, wife of Henry N. Rothery, late private, Company D, Fifth United States Artillery, and a pensioner under certificate No. 369464, appealed April 26, 1901, from the Bureau action of April 6, 1901, rejecting her deserted wife's claim, filed November 2, 1900, under the act of March 3, 1899, on the ground that—

pensioner did not willfully desert claimant, but separation is due to her own conduct toward him, and is in accordance with her wish.

The evidence filed in support of her said application does not materially change the facts as to the alleged desertion as disclosed by the testimony in the special examination of July, 1899, which was carefully considered by this Department in a former appeal, September 5, 1900. (See 11 P. D., 77.)

Claimant testified in an affidavit February 15, 1901, filed in support of her said application of November 2, 1900, that since her husband deserted her in 1890 she had never received any offer to resume marital relations, which she regarded as bona fide; that after the Commissioner of Pensions had awarded her one-half his pension in 1899 her husband came to her door early one morning and told a neighbor to listen to what she would say, but that she declined to stay, and that she (affiant) shut the door and he (pensioner) said nothing to her; that she had been informed that he had made threats against her life, and was afraid to be alone with him. She further testified as follows:

In September, 1899, after a pension payment, he again came to see me, and had a witness, one Rosser, whose affidavit is among the papers in the case, and he then asked me if I did not know that I was his lawful wife, and I again shut the door, and he went away; that subsequently the wife of the said Rosser visited me, she having also an affidavit in the case, and while she was there my husband came to the door and asked me if I was going to live with him, and I again shut the door, and he went away.

Claimant fails to state who informed her that her husband had made threats against her life, and no witness has testified that he had made

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any such threats as alleged, nor is it shown that she had any sufficient reason to fear her husband or regard his offers to renew their suspended cohabitation as not made in good faith.

Pensioner testified in an affidavit January 4, 1901, as follows:

From September 11, 1890, to the present time, I have been to my wife's house, at 511 F street; on Eleventh street; on Sixth street; and again at 800 Sixth street NW., where she now resides, with the intention of seeing my wife, and, if possible, arranging so that we might live together, but upon all such occasions she has not only refused me audience with her, but has absolutely shut the door in my face, and refused me admission into the house or to see me in relation thereto.

Upon seeing her upon all such occasions I spoke to her in a friendly tone, but she would not talk with me, and upon every occasion that I have gotten from her an expression in relation to our domestic affairs, she has always advised me, personally and through my children, that under no circumstances whatever would she live with me, and that I must not come to her house where she was, and if I did so she would have me arrested.

I have always tried to be friendly with my wife, because I felt that her heart would relent, and she might discover her mistakes and errors and return to me, but she has never manifested any such purpose or intention.

That in 1894 and 1895, when I had an operation performed on the wound in my head, and the four times in hospital, my wife never visited me, or wrote to me, or in any way showed any wifely solicitude toward me, but has often threatened me with the police, and sent me messages to the effect that if I did not keep away from her house she would have me arrested.

This has been her course, continued for now over eleven years. * * *

That he does not and never did contemplate abandoning and deserting his wife, but is now and has always been at all times abundantly willing to live with her and provide for her to the best of his ability, but on the contrary she willfully deserted and abandoned him herself years ago, as hereinbefore stated, and engaged in her own business of dressmaking, and insisted upon being and living away from and independent of him.

The attorney for claimant has filed a copy of a bill for divorce by pensioner, which he testified was dismissed by the supreme court of the District of Columbia, in equity, October 11, 1900, after issue joined and testimony by the parties submitted.

The evident inference sought to be drawn from said facts is that the court having denied pensioner's application for divorce based on cruelty and desertion on the part of claimant, that therefore she did not desert him. Such an inference is not warranted. The bill shows upon its face that the object of the divorce was to prevent claimant from annoying him in the matter of his pension, and the court, in the exercise of its equitable jurisdiction, might well have considered in a case where the evidence was evenly balanced that the relief sought should be denied; in fact, such would be its plain duty, as the burden of proof was upon the complainant.

So, also, as stated by Stewart on Marriage and Divorce:

One party to a marriage is justified in leaving the other * * * by such conduct on the part of the other as is cruel, outrageous, though not amounting to cause for divorce.

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In this case the burden of proof rests with the claimant to establish the desertion of her husband, and this she has failed to do.

Even if her husband in the first of their separation abandoned her without legal justification, this would not justify a continued refusal on her part to resume the suspended cohabitation when her husband offered in good faith to resume their marital relations. Such refusal on her part constitutes her the deserter. Stewart on Marriage and Divorce, paragraphs 255–256, briefly states the law on this subject, as follows:

> The one who has the intent to desert, whether it be the one who leaves the matrimonial home or not, is the one who deserts (citing Bishop on Marriage and Divorce, paragraph 787).
>
> Thus if a man without justification makes his wife unwillingly leave him * * * he deserts her. So if the wife drives the husband away. So if the husband refuses to receive his wife who has left him without justification, or a wife her husband. So if they have been separated for cause and the cause is removed, but one of them declined to renew the cohabitation, such one is the deserter.
>
> So an unconditional and bone fide offer to renew cohabitation, made by the deserting party before the expiration of the time necessary to render it a cause for divorce, throws the responsibility for the continuance of the separation on the other party.
>
> Separation by mutual consent of the parties is not desertion in either. But either party may revoke such consent, and if the other party refuses to renew cohabitation it is desertion on the part of such latter party.

Claimant when asked by the special examiner, in her former claim, whether her husband had ever asked her to live with him, replied, "I have never given him a chance." See Rothery *v.* Rothery (11 P. D., 77).

Her own affidavit in this case, heretofore referred to, indicates that she has not changed her intent or conduct in this regard, and her continued refusal to entertain his offers of reconciliation hardly justifies her in charging bad faith on his part.

Without further comment upon the voluminous testimony filed in a former claim, all of which was duly considered at the time of the former departmental decision of September 5, 1900, it is sufficient to say that the word "desert" in the act of March 3, 1899, is used in its general legal sense and means the willful withdrawal of the pensioner from his wife or his voluntary refusal to renew a suspended cohabitation, without legal justification. Richards *v.* Richards (11 P. D., 90); Henry N. Rothery (ibid., 255).

The Department is clearly of the opinion that the evidence in the case shows that the pensioner did not willfully desert claimant, but that his separation from his wife is due to her own conduct toward him and is in accordance with her wish, and the action appealed from is accordingly affirmed.

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INCREASE ACT OF JANUARY 5, 1893—COMMENCEMENT.

ROBERT MARKWOOD.

The increase of pension provided by the act of January 5, 1893, for survivors of the Mexican war who have been pensioned under the provisions of the act of January 29, 1887, or the act of March 3, 1891, should be made to commence from the date, subsequent to the date of the approval of the act granting said increase, at which it shall have been established by the proof that the conditions of disability and destitution existed which are designated in said act as entitling such pensioners to the increase of pension therein provided.

The decisions of this Department of May 19, 1894, in the case of Collins, alias Crossweight (L. B. 125, p. 82); June 8, 1894, in the case of Harmon (L. B. 129, p. 7); September 13, 1895, in the case of Hope (L. B. 182, p. 400); and May 7, 1898, in the case of Levan (9 P. D., 322), and all similar decisions and holdings are hereby overruled and set aside, and Order No. 231 of the Commissioner of Pensions is disapproved and abrogated.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 8, 1901.

Robert Markwood, late a private in Company A, Powell's Battalion, Missouri Mounted Volunteers, Mexican war, was on September 17, 1892, allowed a pension under the provisions of the acts of January 29, 1887, and March 3, 1891, as a survivor of the Mexican war, at the rate of $8 per month from the date of the approval of the last-named act.

On July 6, 1893, said pensioner filed in the Pension Bureau an application for the increase of pension provided by the act of January 5, 1893, which was rejected on September 15, 1893, upon the ground that the members of the organization to which the pensioner belonged, and in which his military service was rendered during the Mexican war, were not entitled to the benefits of said act, its provisions being applicable only to such pensioners as were on the rolls under the provisions of the act of January 29, 1887, at the date of its approval.

Subsequently, on April 3, 1897, the pensioner filed a second application for said increase of pension, which was admitted on February 25, 1898, in accordance with the decision and ruling of this Department in the case of Zachariah Winkler (9 P. D., 172), and on March 3, 1898, his pension was increased to $12 per month, as provided by the act of January 5, 1893, from February 17, 1898, the date upon which said application for increase of pension had been approved for admission by the board of review of the Pension Bureau, in accordance with Order No. 231 of the Commissioner of Pensions.

From this action, commencing the increase of pension allowed the pensioner from the date on which his application for such increase was approved for admission in the Pension Bureau, the present appeal was taken on September 22, 1898.

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Under his first application for the increase of pension provided by the act of January 5, 1893, which was filed in the Pension Bureau on July 6, 1893, the appellant was examined by a board of examining surgeons on August 18, 1893, and it is contended in the present appeal that the increased rate of pension allowed him under the provisions of said act should have been made to commence from the date of the certificate of said medical examination, which established the existence of the physical condition which entitled him to receive said increased rate of pension, as is provided by law in the case of increase of pension under the provisions of the Revised Statutes, instead of from the date of the approval for admission by the board of review of the Pension Bureau of his application for said increased rating.

The action of the Pension Bureau, fixing the date of the commencement of the increased rating allowed this pensioner under the provisions of the act of January 5, 1893, from which this appeal is taken, followed, and was taken in accordance with the holding and ruling announced in the decision of this Department in the cases of Collins, alias Crossweight, decided May 19, 1894 (L. B. 125, p. 82); Harmon, decided June 8, 1894 (L. B. 129, p. 7); Hope, decided September 13, 1895 (L. B. 182, p. 400); and Levan, decided May 7, 1898 (9 P. D., 322), and with Order No. 231 of the Commissioner of Pensions, promulgated July 6, 1893.

Reference to the decisions above cited discloses that they are all affirmative of said Order No. 231, which is as follows:

ORDER NO. 231.

The date of commencement in Mexican war claims for increase under the act of January 5, 1893, shall in each claim be the day on which the case is legally approved for admission by the board of review.

The question raised and presented for consideration by this appeal is, then, as to the propriety, correctness, and legality of said Order No. 231, and of the decisions of this Department sustaining and approving the same.

The act of January 5, 1893, reads as follows:

That the Secretary of the Interior be, and he is hereby, authorized to increase the pension of every pensioner who is now on the rolls at eight dollars per month on account of services in the Mexican war and who is wholly disabled for manual labor, and is in such destitute circumstances that eight dollars per month are insufficient to provide him the necessaries of life, to twelve dollars per month.

It will be readily perceived that, by its express terms, this act relates exclusively to pensioners who have been allowed the service pension granted to the survivors of the Mexican war by the provisions of the act of January 29, 1887. It affects no other kind of pensions, and refers to no other class of soldiers or persons, and is simply a corrollary to said last-mentioned act, increasing the rating under certain

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circumstances and upon certain conditions therein expressly defined of those who have title and who are pensioned under the provisions of the act of January 29, 1887; it clearly and plainly recites that those who are on the rolls under that act shall receive $12 per month instead of $8 per month, provided certain conditions precedent are established. The act of March 3, 1891, under which this appellant was pensioned, merely gave to survivors of Powell's Battalion of Missouri Mounted Volunteers a pensionable status under the provisions of the act of January 29, 1887, and entitled them to receive the increased rate of pension provided by the act of January 5, 1893, under the same conditions, limitations, and regulations as in the case of other Mexican war survivors who were pensioned under the provisions of the act of January 29, 1887. See decision in the case of Zachariah Winkler (supra).

The act of January 5, 1893, is in no sense a "special act," as that term is used and known in pension legislation, but is a component part and parcel of the general legislation by Congress pertaining to, and granting service pensions to survivors of the Mexican war, and is to be construed in pari materia with, and in the light of the pension laws governing the grant of such pensions to that class of soldiers.

It is to be observed that the terms of the act are silent as to the date when the increase of pension therein provided shall commence, but this fact becomes of but little importance, if not wholly immaterial, when it is taken into consideration that the act itself is but an addendum, so to speak, to the act of January 29, 1887.

It is one of the best settled and most familiar rules of interpretation and construction of statutes that all laws which relate to the same subject-matter, having in view but one object relative to a certain designated and defined class of individuals, although such laws may have been enacted at different times and under different and diverse circumstances, and separated even by long intervals of time, are in pari materia, and are to be considered and construed together, as though they constituted but one act. A long line of authorities is cited in support of this proposition by Mr. Sutherland in his work on Statutory Construction, and the soundness of the principle does not admit of doubt. (Sutherland on Stat. Constr., secs. 283–288.)

Moreover, as to this particular phase of the subject we may, if in doubt, take into consideration the title of the act in question, in so far at least as it may shed light upon the general scope of the law which follows: Sutherland on Stat. Constr., sec. 211. The title of the act of January 5, 1893, is: "An act granting increase of pension to soldiers of the Mexican war in certain cases." It is clear, reading this title in connection with the body of the act, which refers exclusively to those soldiers who are on the pension rolls at $8 per month for services in the Mexican war, together with the fact that such indi-

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viduals are embraced by the act of January 29, 1887, and by that act only, that the rule just quoted is directly applicable, and that the act of January 5, 1893, must be considered and construed in pari materia with the act of January 29, 1887.

The act of January 29, 1887, which is the parent act granting service pensions to Mexican war survivors, provides (sec. 2) that pensions thereunder shall be paid "only from and after the passage of this act." This is plainly a limitation of commencement, and provides that the act shall not be retrospective, in that no pension granted thereunder shall commence prior to the date of the act. Upon reading the entire act it will be seen that one of the conditions precedent prescribed by this statute may, in some cases, be present at the date of the passage of the act, to wit, the age limit of 62 years. Therefore when a claimant shows that on the 29th day of January, 1887, he had reached that age, it has been the custom of the Pension Bureau to commence his pension from the date of the act. So, likewise, as to the other conditions precedent of pensionable title, when the proof shows that at a certain date a claimant has a pensionable status and condition his pension should commence from that date; not, however, antedating the act itself.

As a general rule, the pension laws prescribe a definite date for the commencement of pension, which is, in most instances, the date of filing the application; but such commencement is always subservient to the fact that the claimant shall have established by proof that, at the date of the filing, his case met and fulfilled all the conditions of pensionable title under the law, the real question to be decided in all cases being, at what date was the claimant shown to come within the terms of the statute? Recitals in statutes, however, that pension shall commence at the date of the filing of the application are terms of limitation, and this Department has no right or authority to introduce such a limitation into an act by construction, unless the terms of the act, either express or implied, warrant such a procedure. We have seen that there is no such authority, express or implied, in either the act of January 5, 1893, or in the act of January 29, 1887, and, such being the fact, the principle and rule which determines the date of commencement of pension under the last-mentioned act must be followed in fixing the date of commencement of the increase of such pension under the act in question; for "where a statute is made in addition to another statute on the same subject, without repealing any part of it, provisions of both must be construed together." (Sutherland on Stat. Constr., sec. 288.)

Order No. 231 was promulgated on July 6, 1893, has been in force ever since, and has heretofore received the approval of this Department in the decisions hereinbefore referred to, but the Department is now convinced, after mature deliberation, that said order is not based

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upon sound principles. Every rule of law or rule of practice for the adjudication of legal rights is supposed to be founded upon some adequate reason for its existence. Instances can be found where pension has been made to commence from the date of filing the last paper requisite to establish the claim, but this was by authority of the statute (sec. 4713, Rev. Stat.) governing the adjudication of original claims for pension based upon pensionable causes occurring in the service prior to March 4, 1861, and for a definite reason therein set forth. Instances can be found where the title to pension begins from the happening of a certain event or contingency, but all these refer to the commencement of original pensions and reveal a tenable and satisfactory reason therefor, such as death, remarriage, or forfeiture of pensionable rights, to support a shifting title; but, so far as can be discovered, not a solitary reason has ever been given, either by the Pension Bureau or by this Department, in the decisions hereinbefore cited affirming Order No. 231, for the existence of the rule of practice therein announced.

It often happens, in fact it is the general rule, in the adjudication of pension claims in the Pension Bureau, that a considerable period of time elapses between the date when the evidence is all filed in a claim and the date when the claim is finally passed upon and adjudicated. This condition of affairs is absolutely unavoidable on account of the volume of business transacted, but if the evidence on file establishes the claim the Department knows of no sound reason or principle by which the date of commencement of pension must be deferred until the evidence can be acted upon. Such a mode of procedure seems to be most inequitable and unjust. It is through no fault or neglect of the claimant that the press of business or the lack of an adequate force in the Pension Bureau hinders an immediate adjudication of his claim, and certainly he should not be deprived of what is subsequently conceded to be justly his due simply because the adjudicating officers of the Government fail to pass upon the evidence in his case until a later date. Even in a court of law, under the strictest and most technical rules of practice, one practically obtains judgment as of the date that he proved his right to exist.

It would appear, without discussion, that, in the absence of a prohibitory statutory provision, one would, necessarily, be entitled to the emoluments and benefits of a conceded legal right from the date at which it is established by proof that he was entitled to such emoluments and benefits.

In this connection the whole body of pension legislation has been carefully reviewed and, so far as can be discovered, every act making provision for pension, or increase of pension, save the act of January 5, 1893, has prescribed the time of commencement of such pension, or

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increase, nor has the Department been able to find, nor is a single instance known where Congress has permitted the date of commencement of a pension, under any law, to be fixed in the discretion of an Executive Department; neither does the Department know of any law, except the one under discussion, which has ever been construed by this Department to require the date of commencement of the benefits therein provided to be fixed on the date on which the claim thereunder was finally adjudicated by the Pension Bureau.

In every other instance in which an increase of an existing pension has been provided by law the commencement of such increased rating has been fixed by the terms of the act granting such increase, either from the date of the act or from the date subsequent thereto, upon which the prescribed conditions entitling to such increase are shown to exist; generally from the date of the certificate of a medical examination, made under an application for such increased rating, establishing the existence of the physical conditions which entitle the pensioner to the benefits of the act. And in the case of the original grant of pensions, where an arbitrary date, subsequent to the date of the act granting the pension, has been fixed by the terms of the statute for the commencement of the pension, such provisions of the law have invariably been in the nature of statutes of limitation, solely for the purpose of cutting off arrears of pension.

The rule of practice promulgated by Order No. 231 is therefore not only arbitrary and unreasonable, but it is an anomaly in the administration of the pension laws, and a marked and radical exception to the practice that has always obtained in the Pension Bureau; and it is difficult to conceive why it should have been invoked as against the interests of this venerable and most meritorious class of pensioners, whose title to the increase provided by the act of January 5, 1893, depends upon conditions and limitations more harsh, onerous, and exacting than those prescribed by any other pension law now standing on the statute books. It is by no means an infrequent occurrence that, by reason of technicalities, errors, and misunderstandings, years elapse before a claim is finally passed upon and admitted by the board of review. Would it not be most unreasonable and inequitable that a claimant should be deprived of the benefits and emoluments which he has proved, under conditions so rigorous, he was entitled to at a certain date because, by reason of certain technicalities, errors, procedure, and practice in the Pension Bureau, his claim has not been taken up, considered, and disposed of by the Government? From the filing of an application until a claim for pension is finally adjudicated it passes through many hands, must be scrutinized and considered by many different individuals, and, necessarily, much time is consumed, and it would therefore be manifestly and palpably uujust to make the

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commencement of a pension, or an increase of pension, dependent upon the practice and procedure of the Pension Bureau, unless the intent of Congress to that effect was clearly and unmistakably apparent.

Three conditions precedent are recited in the act of January 5, 1893: First, claimant must be on the rolls as a pensioner at $8 per month, under the provisions of the act of January 29, 1887, on account of services in the Mexican war; second, he must be wholly disabled for manual labor; third, he must be in such destitute circumstances that $8 per month is not sufficient to provide him with the necessaries of life. The act does not expressly indicate the date when the increase of pension therein provided shall commence, but it does necessarily imply that any such pensioners on the roll who meet the foregoing conditions of the act at the date of its passage shall be entitled to receive its benefits from that date, January 5, 1893. In any cases in which prospective benefit under said act is sought, not being eligible on the date of its passage, no fixed rule is prescribed, but obviously the commencement of the increase can not antedate the time when such claimants are shown to be wholly disabled for manual labor and in such destitute circumstances that $8 per month is insufficient to provide the necessaries of life. These conditions necessarily require the presentation of evidence to establish these facts, and an adjudication thereon. The act does not provide, nor does it by any fair or legitimate construction of its terms imply, that the increased rating therein provided shall be paid from the time when the legal reviewer in the Pension Bureau, the Commissioner of Pensions, or the Secretary of the Interior, shall become convinced of the truth of the facts alleged, but in plain terms merely authorizes the Secretary of the Interior to pay $12 per month instead of $8 per month to such pensioners on the roll under the act of January 29, 1887, etc., as meet the conditions of the act. Its plain and obvious meaning and intent is that from the time when the conditions exist, subsequent to its passage, the increased rating shall be paid.

Inasmuch, however, as the increase of pension under this act depends upon a condition to be ascertained and determined, just as is the case with increase claims under the general pension law, why should not the same rule mutually apply, viz, that the increase shall commence, not from the date of adjudication, but from the date when the necessary evidence shows the conditions of title to exist?

In view of the foregoing considerations the Department is firmly of the opinion that the act of January 5, 1893, should be considered and treated in pari materia with the act of January 29, 1887, and that the date of commencement of the increased rate of pension therein provided should be the date at which the proof shows that the claimant

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had met and fulfilled the conditions of pensionable title thereunder, not, however, in any case antedating January 5, 1893.

If the proof shows the conditions of pensionable title to exist at the date of the passage of said act, then the increase should commence from January 5, 1893. Obviously, however, it is necessary, for the practical administration of this act in the Pension Bureau, that some definite date should be fixed for the commencement of the increased rate in those cases where the conditions of pensionable title are shown to have first existed at some period subsequent to the passage of the act. The requirement that the pensioner thereunder shall be wholly disabled for manual labor, referring to the physical condition of the claimant, a medical examination is necessarily required to determine and establish this condition, and, therefore, it is believed that, in analogy to the provisions of the law regulating the commencement of increase of pensions under the general pension law (sec. 4698½, Rev. Stats.), the date of the certificate of medical examination, made under an application for such increase and subsequent to the passage of said act, which first establishes the existence of said condition of total disability to perform manual labor should be the date from which the increase should be made to commence in such cases, provided that the condition of destitution, also required by said act, should likewise be shown to exist at that date.

In the case at present under consideration the date of commencement of this appellant's increase of pension under the provisions of the act of January 5, 1893, was arbitrarily made to commence, in accordance with Order 231, upon the date when his application for such increase was approved for admission by the board of review of the Pension Bureau. The action fixing commencement of said increase on said date is, therefore, hereby set aside and reversed, and you are directed to cause this case to be reopened and to readjust the date of commencement of appellant's rating under said act in accordance with the views herein expressed.

Order No. 231 is hereby abrogated and annulled, and you are requested to so modify and reconstruct the same that it may conform to this decision, and the former decisions of this Department in affirmance of said order, hereinbefore cited, and all similar decisions are hereby overruled.

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PATHOLOGICAL SEQUENCE—CEREBRAL HEMORRHAGE—DEATH CAUSE—EVIDENCE.

MARIA BRANTIGAM (WIDOW).

Death of the soldier (who was over 50 years of age) from cerebral hemorrhage can not be accepted as due to injury to left testicle and varicose veins of right leg and resulting amputation of same above the knee, for which he was pensioned. Senile degeneration of the arteries is universally admitted as the most potent cause of said fatal disease, and this is shown to have existed in this case, so that the burden of proof rests on those advancing a contrary opinion.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 13, 1901.

This appellant, Maria Brantigam, is pensioned at $8 per month under the act of June 27, 1890, by certificate No. 382296, as widow of August Brantigam, late of Thirty-second Battery, New York Light Artillery Volunteers. She filed a claim under the general law on April 28, 1893, which was rejected by the Bureau on August 2, 1893, on the ground that the soldier's death had resulted from cerebral hemorrhage, which was not shown to be due to injury of left testicle and varicose veins of right leg, and resulting amputation of same above the knee, for which he had been pensioned. Some additional evidence was filed in March, 1898, to reopen the claim, but the Bureau declined to do so, for the reason that no new or material facts had been adduced which warranted any change of action.

The attorney of record in the claim filed an appeal from said action on December 10, 1898, in which he alleged that it was error, because the evidence filed showed that the cerebral hemorrhage, which was the immediate cause of the soldier's death, was due to the disabilities for which he had been pensioned.

The soldier was pensioned at the time of death at $36 per month for the above-named disabilities, the claim for varicose veins and results having been made in 1889 and allowed in 1892, while the evidence showed that the amputation of the leg had been made in May, 1890. He was last examined on February 4, 1892, when the surgeon reported that he was 5 feet 6 inches in height, with normal pulse rate and respiration; was 56 years old, and weighed about 140 pounds. The surgeon stated that the heart, lungs, liver, spleen, and abdominal viscera were normal; that he had a right oblique complete inguinal hernia reducible and retainable by a truss; that his right leg had been amputated 10 inches below the hip joint, and that the cicatrix was healthy, but there was a neuroma on the sciatic nerve of the size of a hickory nut, which was very tender to touch and painful, and that the left testicle was one-third larger than the right and was tender.

The surgeon concluded his certificate with the statement that the soldier required the constant aid and attendance of another person, but does not state the cause of this condition.

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Dr. F. H. Zitz told the special examiner in February, 1892, that the soldier came under his care in a few months after his leg had been amputated, when he found that he had a very painful stump, which was probably due to the nerve being included in the scar, so that he had been in bed for a month, as any movements of the stump caused excruciating pain, and that he had advised him to have the nerve resected.

The soldier died on April 12, 1893, after an illness of five days from cerebral hemorrhage, as appears from a copy of the public record of death, in which it is also stated that general debility, after amputation of leg, two and a half years ago, was a contributing cause.

The attending physician, Frank H. Zitz, stated in a communication addressed to the Bureau, filed June 30, 1893, that the soldier was much run down and his stump healed badly, and had been very painful ever since, so that he had been confined to bed and chair, as even slight exertion of walking with crutches would cause agony. This preyed on his mind, especially as a second amputation, which he had advised, was refused him on account of the risk, and this, in his opinion, was more or less the cause of the cerebral hemorrhage which ended his life. He was called to see him April 5, when he complained of vertigo; on April 8 he was unable to speak; after this time he gradually lost the power of deglutition and of moving his tongue, then fell into a stupor and died on the 12th. A consultation was had in the case and the conclusion was reached that death was due to cerebral hemorrhage, probably at the base of the brain.

Dercum, in his work on Nervous Diseases, on page 460, states that—

> The morbid condition underlying intra-cranial hemorrhages, which are not due to trauma, is invariably disease of the blood vessels of the brain, and in most cases disease of the arteries. It is impossible to rupture a healthy artery by any ordinary physiological or pathological disturbance; consequently the fundamental facts concerning the pathology of cerebral hemorrhage are those which pertain to arterial disease.

On page 461 he also states that—

> It is generally admitted that the cerebral arteries are subjected to three different morbid conditions; one of these is that known as fatty degeneration; the second is that known as degenerative arteritis, and the third that of atheroma, a condition which really should be classed along with degenerative arteritis. * * * Atheromatous degeneration affects only the larger vessels and chiefly those at the base of the brain; it is found in from one-eighth to one-fifth of the cases of cerebral hemorrhage.

Osler, in his work on Practice of Medicine, states, on page 870, that—

> The conditions which produce lesions of the blood vessels play a very important part in etiology of cerebral hemorrhage; thus the natural tendencies to degeneration of the vessels in advanced life makes apoplexy much more common after the fiftieth year.

In this case the soldier had passed the age of 57, and had reached the time of life when cerebral hemorrhages occur most frequently,

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according to the tables of vital statistics. While the attending physician has stated that he had been suffering from neuralgia for some two years, and has asserted that it was the cause of the fatal central hemorrhage, yet he has adduced no authority in support of his statement, and a careful search through the writings of Dercum, Quain, Osler, Bartholow, and Da Costa on the subject of cerebral hemorrhage fails to discover anything that lends the slightest support to Dr. Zitz's statement. Senile degeneration of the arteries is universally admitted to be the most potent cause of said disease, and this is shown to have existed in this case, so that the burden of proof rests on those who advance a contrary opinion.

In view of the facts in this claim, it is believed that the action of the Bureau in rejecting appellant's application for a pension under the general law on the grounds stated was correct, and said action is therefore affirmed.

SERVICE—ACT JUNE 27, 1890—REJECTED RECRUIT.

JOHN S. ROBINSON.

Claimant was enlisted as a substitute in the service of the United States and was carried on the rolls as such for a period of more than ninety days, when he was discharged as rejected for disability by a board of inspection. He was not assigned to any company, and he did not serve in the military service in the sense contemplated by the act of June 27, 1890, and is not entitled to pension. (See cases of Rathton, 9 P. D., 162, and Ransom, 5 P. D., 183.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 13, 1901.

John S. Robinson, late unassigned, Twenty-ninth Connecticut Volunteer Infantry, has filed several applications for pension under the act of June 27, 1890, all of which have been rejected. Those filed in 1892, 1894, 1896, and 1897 were rejected on the ground that no ratable disability under said act was shown to exist. One, filed April 4, 1899, was rejected August 22, 1900, on the ground that claimant did not render ninety days' actual service, as required by the act, but it is shown by the records of the War Department and claimant's own statement that he never joined said regiment.

A statement from the Auditor of the War Department, showing that pay for a certain period had been allowed the claimant, having been filed for the purpose of having the case reopened, such action was denied December 13, 1900, and the rejection was adhered to. Appeal has been entered May 10, 1901, by the attorneys of record, who contend that inasmuch as it is shown by the records of the War Department that the claimant was enlisted September 10, 1864, and was carried on the rolls until January 14, 1865, when he was discharged, and was allowed pay, it is conclusive that he was under military control

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and subject to military orders for a period of one hundred and fourteen days, and, therefore, is entitled to a pension under said act, without reference to the fact that "he was not assigned to a company" and "performed no active military duty."

There is no dispute as to the correctness of the above statement regarding the dates of enlistment and discharge and the claimant's name being on the rolls of Connecticut colored substitutes. On this subject one report of the War Department states:

> John Robinson, unassigned, Twenty-ninth Connecticut Colored Infantry, is regarded by this Department as having been properly in the military service of the United States from September 10, 1864, to January 14, 1865, notwithstanding the fact that he was ordered to be discharged from the service, without pay or allowances, on account of his rejection by the board of inspection, pursuant to paragraphs 980 and 981, Revised Regulations.

The surgeon's certificate of disability shows the basis of claimant's rejection and discharge to have been that he was "incapable of performing the duties of a soldier because of old bubos, œdema of scrotum, broken down." He was not assigned to any company and it is not shown that he ever performed any military duty. Thus, while it may be admitted that he was in the military service of the United States, he did not serve ninety days or more in the sense contemplated by said act of June 27, 1890. The case is almost parallel as regards soldier's relation to the service with that of the husband of Nancy Rathton, whose appeal was decided December 29, 1897. (9 P. D., 162.) The headnote of that decision is as follows:

> Soldier enlisted October 15, 1864, was accepted by the board of enrollment of the Eighth Congressional district of Indiana on the same day as a substitute. He was examined by a board of inspectors November 7, 1864, and rejected. He was furloughed to await discharge and was discharged April 1, 1865, on a surgeon's certificate because of "deficient amplitude and expansive mobility of chest; said disqualification existed at date of enlistment." He was never assigned to any military organization, nor ordered on detached service, nor is it shown that he ever performed any active military service.
>
> *Held:* That soldier did not serve ninety days in the war of the rebellion, or in the Army of the United States, within the meaning of sections 2 and 3 of the act of June 27, 1890. (See case of Albert K. Ransom, 5 P. D., 183.)

In the body of that decision as well as in that of Ransom, cited, the question here involved is fully discussed, and it is unnecessary to go over the same course of reasoning in this case. It is sufficient to refer to those decisions as containing the proper views and conclusions relative to claimant's title to pension under the act of June 27, 1890. The action in the claim is accordingly affirmed.

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FEE—ATTORNEYSHIP—FORFEITURE—PRIMA FACIE CASE.

ANNIE E. MEYERS, WIDOW (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

Where an attorney has prima facie established a claim for pension, and no call for additional evidence has been made, he has earned the fee, though subsequently to his death another attorney filed evidence, for which the Bureau could have issued a call.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 13, 1901.

Milo B. Stevens & Co., of Washington, D. C., January 24, 1901, entered an appeal from the action of the Bureau in the matter of fee on the issue of July 2, 1897, in the claim for pension under the general law of Annie E. Meyers, as widow of Seth F. Meyers, who served as surgeon, Seventy-third Indiana Volunteer Infantry.

In behalf of the claimant on January 23, 1895, George E. Lemon, deceased, filed a declaration for a widow's pension under the general law, and on November 26, 1895, he filed articles of agreement stipulating for the payment of a fee of $25. He filed evidence March 8 and 20, 1895, the last of which prima facie completed the claim so far as the services of an attorney were concerned.

F. L. Williams, of Washington, D. C., on November 9, 1896, and February 18, 1897, filed powers of attorney in the claim, and on March 13, 1897, he filed articles of agreement stipulating for the payment of a fee of $25. On March 13, 1897, he also filed evidence that the claimant had not remarried. The claim was specially examined in June, 1897, when further evidence was obtained that she had not remarried.

Mr. Lemon died December 18, 1896. The appellants' title to the fee is considered by the Bureau as under assignment in their favor, dated July 23, 1897, by the executors under the will of George E. Lemon.

On July 2, 1897, certificate issued to allow pension in the claim. On said issue Mr. Williams was certified a fee. He has been notified of the fact that Milo B. Stevens & Co. appealed from said action.

The position taken by the Bureau as to the title to fee in this case is that the evidence filed by Mr. Williams was material, as evidence of the claimant's widowhood had not been filed for a period of two years, and as it was filed at a time when there was no other attorney in the case he was entitled to recognition; that as he filed material evidence and was not chargeable with neglect when the claim was allowed, he was entitled to the fee upon the issue of certificate to allow pension.

Appellants argue that the fee was earned at the time of the death of Mr. Lemon, and therefore his executors could make a valid assignment of the fee, and as such executors made assignment of the fee to them they are entitled thereto.

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When an attorney has performed all services required of him by the rules of practice and by the Bureau, and has observed the rules of practice in other respects, the fee is earned by him, and he, or, upon his death, his legal representatives, can assign the fee to other parties. When such assignment is made, the Bureau will certify the fee to the assignee. (See case of William Goodson, 7 P. D., 294.)

In the decision of the Department in the case of Robert McCorkle (7 P. D., 158), are stated facts that constitute a case where the fee is earned by an attorney, viz, where the attorney of record has prima facie established a claim and no further services are required of him, though the claim is thereafter specially examined. The question still remains to be considered, and it is an essential one in this case, whether an attorney has earned a fee when there is material service to be performed before the Bureau sees fit to allow the claim.

The Bureau, in support of its action in the payment of the fee to Mr. Williams, recites that the evidence filed by said attorney was material. This may be true, but likewise it is true that the evidence adduced (after a claim is prima facie complete) on special examination is material. Yet it is held in the case of McCorkle, supra, that an attorney has earned a fee although the claim is placed in the hands of a special examiner subsequently to the date that the attorney of record filed evidence in the claim. So under the decisions of this Department the fact that further and additional evidence may be necessary before the Bureau will allow pension to the claimant is not a test as to whether the attorney has earned a fee in the particular case. If the attorney of record has prima facie completed the claim he may be entitled to the fee, although further evidence can be required by the Bureau before the claim is allowed. But it follows that this additional service is not expected of an attorney until the Bureau has issued its call for such evidence. It is believed that this is a reasonable view of the practice. The rules prescribe the evidence necessary to establish a claim for pension. When such evidence has been supplied, it can not be assumed that the Bureau requires any additional evidence until it has issued a call therefor. It follows that the attorney of record may have earned the fee, although evidence was lacking which the Bureau can require in addition to such evidence as is prescribed by the rules of practice for prima facie establishing a claim.

In this particular case the appellants, as the transferees of Mr. Lemon, were denied a fee for the reason that subsequently to the death of Mr. Lemon evidence was filed which was deemed material. This evidence consisted of the testimony of witnesses that the claimant had not remarried, and was deemed material because evidence of the fact had not been filed in the case for a period of two years.

The rules of practice do not require an attorney to file evidence at intervals in a widow's claim for pension, while pending in the Bureau,

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that she has not remarried since the death of the soldier. Such a requirement in a widow's claim, when it has been prima facie completed, would be unreasonable. For, when all evidence prescribed by the rules of practice has been filed, the claim awaits adjudication. Further evidence as to the nonmarriage of the claimant would be necessary only in event of delay to adjudicate the claim—a condition which is not contemplated by the rules of practice.

Though in the event of delay to adjudicate the Bureau could properly require further evidence of nonmarriage, it would not be necessary to file such evidence under the rules of practice. It would not be incumbent upon the attorney of record to file the evidence in question unless the Bureau issued its call therefor. The attorney of record can only be required to meet the exigencies of a case as they exist.

The rules of practice do not contemplate the forestalling of emergencies that may possibly arise and therefore do not require of an attorney that he shall have evidence on file which precludes possibilities occasioned by delay to adjudicate a claim or by other causes. If an attorney has, prima facie, completed a case, in accordance with the published regulations, it is not expected that he will do more unless further orders are issued. If nothing further is asked for by the Bureau, then the fee is earned by him, the right thereto becomes vested in him, and, upon his death, in his legal representatives.

Mr. Lemon died before the claim was allowed, but it is not manifest that this fact complicates the situation. Had a call for further evidence been issued, then the case would not have been completed by him, nor the fee earned by him. It may be urged that had a call been issued for further evidence as to continued widowhood of the claimant, Mr. Lemon could not have complied with the call, and, therefore, it would have been useless to issue a call; furthermore, that the evidence was filed by Mr. Williams subsequently to Mr. Lemon's death, and for that reason it was not necessary to issue a call for such evidence.

The answer to all this as an objection to the proposition that the fee was earned by Mr. Lemon is found in the reasons assigned in support of the proposition, viz, that there was no demand for such evidence until a call therefor was issued. This has been explained. It can not be assumed, when no call for evidence was made, from existing conditions in a case, that one would have been made but for the fact that evidence was supplied which dispensed with a call for such evidence. To so assume would be equivalent to making a demand out of what is subsequently deemed a necessity therefor. In such an event title to fee would rest, not upon what the rules of practice or the Bureau require, but upon a theory as to what might, could, or would be required at the option of some person.

As to the objection that Mr. Lemon was dead, and, therefore, had a call been issued he could not have complied therewith, it can properly

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be answered by saying that the objection deals with facts not in any way germane to the question at issue, viz, whether he had earned the fee in this case. It may be significant to add that in this case as in the case of McCorkle, supra, there was a special examination held after the attorney of record was dead, yet in the case of McCorkle it was held that the fee was earned by him though additional and material evidence was obtained by the process of special examination subsequent to his death.

Though further material evidence was supplied by an attorney who was contesting for recognition in the claim, there is no difference whether it was thus obtained or by a special examination. The material fact is whether the Bureau has issued a call for such evidence. Applying this test to the facts arising in this case, it is clear that the right of Mr. Lemon to the fee is unquestionable, as no call for additional evidence was ever made. As he had earned the fee his title thereto, upon his death, passed to his legal representatives, under whose assignment title passed to the appellants.

Accordingly the action of the Bureau in denying them a fee is reversed. It is directed that a copy of this opinion be served upon Mr. Williams.

REIMBURSEMENT—ACCRUED PENSION—FRAUD AND MISTAKE.

JOHN LA MOUNTAIN.

Where Bureau officers have fairly acted in the exercise of discretionary judgment in passing upon evidence, in the absence of proof of fraud upon the part of the claimant, no future discovery of testimony which tends to discredit that first acted upon can authorize reimbursement to the Government from accruing pension.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 6, 1901.

John La Mountain, formerly private, Company G, One hundred and fifty-third New York Volunteer Infantry, who was granted $4 per month, June 20, 1885, to date from October 3, 1865, for injury to head, and who was granted a pension at $8 per month, under the act of June 27, 1890, July 12, 1890, and dropped from the rolls under the general law on that date, filed a claim for restoration and increase under the general law, June 18, 1890, alleging that he contracted catarrh (a new disability) in line of duty while in the military service. September 28, 1897, this claim was rejected in the following language:

Rejection for restoration and increase under the general law for injury to head on the ground that evidence taken on special examination shows that it was incurred in a drunken brawl with claimant's wife subsequent to his discharge. Catarrh rejected on the ground that evidence taken on special examination shows that it existed prior to enlistment.

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On November 4, 1897, a letter of notification was sent to the claimant from the Bureau, which is as follows:

It appears from the records of this Bureau that you were pensioned June 20, 1885, under certificate numbered 299499, at the rate of $4 per month from October 3, 1865, for injury of head, based on your service as a private in Company G, One hundred and fifty-third New York Volunteer Infantry.

Your pension as above terminated July 11, 1890, by reason of the allowance to you of pension, under the act of June 27, 1890, at the rate of $8 per month, from July 12, 1890, for naso-pharyngeal catarrh and disease of heart.

It further appears, from evidence obtained by means of a special examination now on file, that the original allowance of your pension based on injury of head was erroneous and contrary to law, as said disability is in no way due to your military service as required to give title under the law by which you were pensioned, but was incurred in a fight with your wife while you were in a state of intoxication subsequent to your discharge.

You are hereby notified that your certificate will be reissued under the act of June 27, 1890, at the rate of $8 per month, and payments will be withheld until a sum accrues sufficient to reimburse the Government for the amount erroneously paid you under the general law, viz, $4 per month from October 3, 1865, to July 11, 1890, inclusive.

Under the provisions of the act of Congress of December 21, 1893, you will be allowed a period of thirty days from receipt hereof in which to make such answer as you deem proper, and to show cause why the action as above indicated should not be taken.

Some little evidence was filed with a declaration for restoration to the general-law rolls, alleging injury to head December 21, 1897, which was again rejected November 18, 1898, as follows:

Rejection for restoration under the general law for injury of head on the ground that same was not incurred in the service, as shown by special examination, and the testimony filed recently not deemed sufficient to establish same as of service origin.

March 9, 1899, the affidavits of four witnesses were filed with a view to reopening the claim, but March 9, 1900, the former rejections were adhered to. In this action it was stated that one "Mary La Mountain," with two other affiants, had been cross-examined by a special examiner, and that the evidence of the other witness was not sufficient to overcome the adverse testimony on file.

July 28, 1900, the claimant filed an appeal to the Department, in which he states that certain prejudiced witnesses opposed his restoration, and that the evidence shows that the disability for which pension was originally granted was actually incurred in the service, as alleged. The appeal concludes as follows:

I therefore submit that the suspension is contrary to law, and that, although some of the evidence that was drawn out on special investigation is contradictory and goes to show that one of the disabilities for which I was pensioned existed prior to my enlistment, I am still entitled to a rating under the disabilities that are positively shown to be of service origin. The evidence of Oliver Burrill, Joseph Burrill, and Mary La Mountain I contend is sufficiently strong to warrant my restoration. Mary La Mountain, whose evidence is referred to as that of my wife, is in error. It was the testimony of another Mary La Mountain, who did not clearly understand the nature of the questions asked.

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I therefore submit and ask that the evidence on file be reexamined, and that if any doubt exists the benefit of the same should be extended in my behalf, and I ask for a readjudication of the claim on its merits. All of which is respectfully submitted.

This appeal raises the question of the sufficiency of the evidence to establish that the injury to claimant's head and the catarrh, as alleged, occurred during his military service and in line of duty, and whether the action of withholding claimant's pension under the act of June 27, 1890, in order to reimburse the Government for amount wrongfully paid to him under the general law was proper.

The evidence in regard to the incurrence of the alleged injury to head in the service is supplied by two comrades and the captain of claimant's company. One of these comrades claims to be an eyewitness to the incurrence of the injury. He substantially corroborates the claimant's account of the injury, although as to effects there is square contradiction, as there also is as to minor details.

The claimant's story is that some time in July or August, 1865, while on patrol guard duty, in Savannah, Ga., he was near a stack of arms when a colored soldier, or a colored man in a soldier's uniform, tried to take a gun off the stack, and the claimant told him to let that gun alone, when the colored man grabbed and swung the butt of the gun against his head, knocking him senseless; that he was taken to a hospital, where he was treated. Before the special examiner the claimant adhered to this story.

Peter Facto, jr., the comrade who claims to have witnessed the incurrence of the injury as detailed by the claimant, in an affidavit filed in 1884 substantially corroborates the claimant, saying that he helped the claimant to his feet and saw blood on the side of his head, but could not say whether he was sent to the hospital or not. On cross-examination this witness did not corroborate his affidavit in detail, but did adhere to his statement that he witnessed the hitting of claimant by the gun as he had described. He said at that time that claimant was not on duty when he had the quarrel with the colored soldier. He said there was no stack of guns at the scene of the quarrel and that claimant was hit with the colored soldier's gun, and that he could not say what caused the quarrel. In accounting for the discrepancy between his affidavit and statement before the examiner he said he could not read and had to depend on others to do his writing for him.

E. M. Fitch, captain of claimant's company, made affidavit as follows:

That he was captain of Company G, One hundred and fifty-third Regiment New York Volunteers, in the late war, and knew John La Mountain, a private in said company; that said La Mountain, while in active service in said regiment, in Savannah, Ga., was injured while on patrol duty, as it was reported at said time that he was knocked down by a colored soldier; that at said time said La Mountain was sent to the hospital to be treated for injuries received in such way in 1865.

The above affidavit was subscribed and sworn to August 4, 1883.

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On the 6th day of May, 1896, Captain Fitch appeared before the special examiner. He then stated that he could not recollect that claimant was injured in the service. He did recollect that some member of his company was hit over the head by a colored soldier, but he knew none of the circumstances. His attention being called to the affidavit quoted as above, he said:

At the time I made that statement I had some memoranda that possibly refreshed my mind regarding this matter, but my papers containing the memoranda were burned some few years ago. I can not now say that La Mountain was hurt in the service.

John Kiernan, a comrade, testified before the special examiner that in the summer of 1865, in Savannah, Ga., the claimant did get into a "squabble" with a "nigger," and was injured some way. This witness's statement continues:

We did patrol duty in Savannah all summer. Before the war closed the negroes, if they saw a white man coming along the sidewalk, would get off into the street, but after the war closed it was quite the reverse. I was not present when he was injured, but when he came into camp he told me he had been hit upon the head and knocked down by a negro. He further said that he and the negro had trouble over a gun and the negro seized the gun and knocked him down as above stated. I probably heard what started the trouble, but have now forgotten what it was.

This witness states that he never heard that the injury thus incurred was at all serious or that he could remember that claimant was off duty on account of same.

Continuing, this witness testified:

There was talk in the company that if the negro could be found he would be served the same as he served La Mountain. I do not know whether the blow to head made a wound or not. I have heard claimant's deposition read and should say it was about the way he told me the injury was incurred. * * * There is no doubt he (claimant) was injured as alleged, as I heard him tell about it; in fact, it was the talk of the company how he had been licked by a "nigger."

It should be noted that this last witness did not make a statement in the original claim. Studied from the view point of probability there is nothing in the claim as originally considered by the Bureau that threw doubt about it. The claimant may well have been hurt as he described, but whether the injury was incurred in line of duty is a question aside from the inquiry at this moment. Yet, the evidence quoted is not all that was considered by the Bureau in its initial action.

June 19, 1883, Dr. William S. Daggett signed and swore to the following statement:

I treated John La Mountain, private, of Company G, One hundred and fifty-third Regiment, New York Volunteers, November 1, 1865, for fracture of the parietal bone of the left side; found a deep depression; much pain in the opposite side and paralysis of the legs. Was not able to move about for a year or more. Has since frequent attacks of pain in the head, and paresis of the legs, lasting for an indefinite time.

The reputation of this affiant has been unimpeached, and, in fact, he is reported to be perfectly reliable.

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Peter Barnaby, a brother-in-law of claimant, whose reputation is good, testified that claimant complained of pain in his head on his return from the Army, and said further:

I have seen he had a kind of scar on the left side of his head, but I do not know how he got it. I never mentioned it to him. Yes, he had that scar on his head when he came home from the Army. No, I did not see any running sore on his head. It was a scar about 1½ inches long and had no hair on it. I never heard him tell how he got that hurt.

Andrew Burrill, of good reputation, who knew the claimant prior to and since his (claimant's) service, made affidavit that he helped claimant off the train in October, 1865, and at that date the claimant spoke of the injury to his head, and that he was hit by a colored soldier with the butt of his gun. In response to a letter from the Pension Bureau, this witness stated the following:

Your letter of the 28th received. In reply I would say I saw John La Mountain when he returned home from the war. In fact I was at the depot when he arrived, and I assisted him home. He claimed he was injured in his head. I examined his head and I saw scars. He also complained of his leg and appeared to be lame. * * *

This last witness and the physician who treated claimant on or soon after his return home were dead when the special examination was conducted.

Can there be a well-founded doubt that the claimant received some kind of an injury to his head in the service? The statement of the captain, after the special examination, rises almost to the dignity of a record. He made his first statement from memoranda which, he says, possibly refreshed his mind, his records being destroyed at the date of his examination. It is wholly incredible that the doctor and the corroborating witnesses who saw the scar on claimant's head at his return from the Army could all have been mistaken. Certainly the captain, who made his first statement from memoranda, made at the time from reports to him, could not be other than reliable. Then the doctor makes a positive statement as to treatment for the injury eleven years before the "brawl" with the wife, as subsequently testified to. This positive statement, descriptive as it was, and corroborated by subsequent medical examinations locating the injury to the head, make his statement worthy of credit to a high degree.

The evidence, as a whole, seems of such a character as to warrant the conclusion that was reached by the Bureau in the first instance. The facts elicited long afterwards by special examination seem to indicate that the disability from this injury was increased by, and complicated with, a subsequent injury to the head in a drunken brawl with claimant's wife in the year 1876, as stated in the rejection quoted.

Joseph Burrill testified that it was rumored that claimant went home drunk once and his wife struck him over the head with a bottle. He did not know who told the story and could not say there was the "first bit of truth in it."

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Nelson Dame testified before the special examiner as follows in regard to the "brawl:"

Soon after he (claimant) got home, should say some two or three years, he came home drunk one night and began to abuse his wife, as he had always had the reputation of doing. After she had stood his abuse long enough, she up with a bottle and struck him over the head. Of course I know nothing about this personally, as I was not there, but right after this happened he came out with his head all tied up, and the story got out.

Emerson B. Rand testified substantially as the above witness as to the brawl between claimant and his wife and the rumors about same.

Isaac Baker testified as follows in this regard:

Along about the time of the Centennial in 1876 his (claimant's) father (dead) came over after me in the night and said: "I think John's wife has killed him." I went over and the old man found the doors locked, so he got in through the window, as did also myself. There we found John on the floor drunk, as I thought, with quite a swelling on the side of his head, the old man telling me his wife and he had been quarreling and she had hit him over the head with a bottle. No, the head was not bleeding that I could see. * * * There was no light in the room, and none was lighted. * * * I examined his head and found the swelling with my hand. I guess I did not see him after this for a week or more. When I did see him he complained of his head, and did all the time I knew him.

There is no doubt but that the claimant was hit in the head by his wife, as described. Is this established fact at all inconsistent with the other apparently established fact that claimant was injured in the head in the service, as alleged? Is it not possible that claimant may have been injured on the head on both occasions? The second injury by no means excludes the possibility of the first.

It will be noted that there is no description of the injury caused by the wife, either as to its location (except that it was to "the side of the head"), or as to its character. From the evidence it is impossible to determine where on the head the bottle struck. No presumption follows that it was the only injury the claimant had ever suffered to his head. While it is possible and even probable, from the location of the first injury (just above the ear on the left side) that when the wife swung the bottle she landed upon the injured portion of the head, it is not sustained by any evidence in the record. The claimant swears he was never injured in the head except in the service.

There is no record of treatment in the service for the alleged injury to the head. This fact was before the Bureau when the claim was allowed. The statement of one comrade, the statement of the captain of the claimant's company, the testimony of two witnesses who saw the scar on claimant's head, and the testimany of the physician who treated claimant on his return from the Army, admitted the claim. At the date of the allowance, 1885, the Bureau officers exercised their discretionary judgment. After such exercise upon what grounds can such judgments be disturbed and set aside?

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In an opinion rendered by the assistant attorney-general, December 3, 1889, this question is exhaustively discussed. The decisions of the Department are reviewed and commented upon. It is therein stated:

> It will be observed that the trend of the decisions has been to the effect that where there has been fraud upon the part of the pensioner, or where there has been a mistake of fact in the adjudication of a pension claim which results in the overpayment of money as pension, in such case the Government may reimburse itself by withholding the accruing pension until the amount overpaid is made good, and of the correctness of this position there can, I think, be no reasonable doubt.

It has never been held by the Department that there is any authority to withhold pension money to offset moneys which may have been paid out as the result of an error of judgment of officers charged with the administration of the pension laws. Christian May (8 P. D., 71).

Has any fraud been proved to have been practiced on the Government by the claimant in this case? No mere probability or possibility that fraud may have been used in a particular case is sufficient.

In the case of James A. Trosper (8 P. D., 75) it was held that concealment of certain facts material to the inquiry by a claimant amounts to fraud. But in that case it was shown that the resulting injury claimed for was actually a result of something which occurred prior to the claimant's enlistment, and is not at all in point with the case at bar.

The Bureau action in the case at bar was prompted by proof of a subsequent injury, from which it seems to have been concluded there could have been no injury as alleged in the service. Such a conclusion is not warranted in any view. Later, at the special examination, it appeared that the comrade who gave the original statement as an eyewitness to the incurrence of the injury was not altogether trustworthy; that the claimant received a blow on his head in 1876; that some of the witnesses fail to corroborate their first statements. All this goes to the question of the justice of the Bureau action in rejecting the claim for restoration and increase, rather than to the grounds for reimbursement to the Government of moneys accruing under a pension granted under another law.

From all the evidence in the case, considered at the time of the original allowance, it is concluded that such an allowance was made after an exercise fairly of discretion in the matter of weighing testimony by the proper officers of the Government, and in the absence of proof of fraud upon the part of the claimant, money paid under a grant of pension can not be recovered by the Government from accruing pension under another law.

There remains for consideration the action of the Bureau in rejecting the application for restoration and increase of pension under the general law. This inquiry involves the character of the testimony disclosed by the special examination from which the bureau reached its

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conclusion in 1897. In other words, was the Bureau justified, on the evidence before it at this last-named date, in rejecting the claim for restoration and increase?

The examination discloses that the reputations of the claimant and the witness Facto were not good; facts which were easily ascertainable at the date of the original allowance. But the special examination in no way disturbed the statements of the captain of claimant's company or of the physician who treated claimant immediately on his return home from the service. On the contrary, the statement of the captain is strengthened and a new witness, Kiernan, appears who corroborates both Facto and the claimant in testimony as to contemporaneous statements. In so far the original testimony on which the Bureau acted is strengthened and supported. But the special examination disclosed that claimant was injured in the head by being hit with a bottle in the hands of his wife in 1876, eleven years subsequent to the injury of service origin. It is impossible to determine from the evidence the extent of the injury or results therefrom of this second injury. From the circumstances surrounding the second injury it appears no amount of inquiry would develop that fact. It is worthy of remark that the claimant, though duly notified of the cause of rejection and grounds on which the Bureau claimed the right of reimbursement from accruing pension, has filed no evidence denying that an injury resulted from the hit on his head by the bottle. No presumption arises to aid a conclusion as to the degree of injury from either of the proven injuries. From all that appears in the evidence resulting disability may have come from one as well as the other, each being proven to have been incurred prior to the allowance of pension for such injury, thus leaving to mere speculation and guesswork what should be proven by the claimant. With all the evidence under review it appears that the claimant was injured in the head in some such manner as he alleged in the service, thus relieving him from the charge of fraud in making claim therefor. If the claim was allowed in the first instance on insufficient testimony, as to the manner of its incurrence, or as to the results therefrom, the Bureau may correct its action and refuse to pay further pension therefor, but it has no right to make the claimant suffer a penalty for the failure of officers charged with such duty to weigh aright evidence submitted in support of a claim. Where bureau officers have fairly acted in the exercise of discretionary judgment in passing upon evidence, in the absence of proof of fraud upon the part of a claimant, no future discovery of testimony which tends to discredit that first acted upon can authorize reimbursement to the Government from accruing pension.

The claimant and the witness who states that he saw the incurrence of the injury in the service, being shown upon special examination to be unreliable, the remaining evidence is not of such a character as

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would have warranted the allowance of pension in the first instance, in the absence of a record. After the special examination a well-founded doubt existed as to whether the injury to head as alleged was received by the claimant while he was in line of duty. There is no reliable evidence in the record that there were any serious results from the blow received by the claimant in the drunken brawl with his wife, but the presumption arises that where there was a blow there must have been some resulting injury. The claimant says he never received an injury to his head other than the one in the service, and while this may be the fact, no warrant for believing this statement is found in the evidence in the case.

The claim for increase on account of catarrh (new disability) was properly rejected on the ground that two witnesses before the special examiner swear that claimant had catarrh prior to his entry into the service. One of these witnesses appears to be prejudiced, but because of an absence of a record for treatment in the service and the fact that no application was made on this account until 1890, and the character of the testimony relied upon to prove origin in the service and continuance after service to date of filing claim the action is considered right.

The action of the Bureau in rejecting the application for restoration and increase is affirmed.

The action of the Bureau in withholding the pension granted under the act of June 27, 1890, to reimburse the Government for moneys paid under the old law claim is reversed.

MARRIAGE—VOID MARRIAGE—ESTOPPEL.

PHEBE ANN COBURN, NOW ROBBINS (ALLEGED WIDOW).

The claimant is shown to have separated from the soldier shortly after his return from the Army and in 1866 (while the soldier was still living) married one A. J. Pebbles, with whom she lived until he abandoned her in 1880. The soldier died in 1871. She alleged that she had heard that the soldier was dead before she married Pebbles, but learned that he was alive some time afterwards—about a year before his death.

Held: That by her marriage to Pebbles in 1866, and subsequent conduct she is estopped from claiming pension as the widow of the soldier.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, April 30, 1901.

Herewith are returned the papers in the appealed pension claim (No. 276930) of Phebe Ann Coburn (now Robbins), alleged widow of Butterfield V. Coburn, deceased, formerly a soldier in Company F, Eighth New Hampshire Infantry. The said soldier died on June 24, 1871. The claimant filed her application for pension as his widow on

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June 28, 1880, and it was rejected in August, 1890, after a special examination, on the ground that "the claimant married A. J. Pebbles in 1866, before the soldier died, and continued to live with him as his wife to the year 1880." An appeal was taken on October 25, 1898, in which it is contended that if it be true that the claimant married Pebbles prior to the death of the soldier (which she denies) the marriage was illegal and void and constitutes no bar to her receiving pension as the widow of the soldier.

The facts in the case, as developed by the special examination, are as follows:

The soldier and the claimant were lawfully married on May 2, 1846, and lived together until his enlistment in the Army on December 21, 1861, during which time several children were born to them. After his discharge from the Army, on November 21, 1863, the soldier returned to her, and they lived together for a time, but his health was broken and he was probably unable to support himself, much less his family. He appears to have taken to roving about, returning to his family at intervals. During one of his absences, in the fall of 1866, the claimant was married to one A. J. Pebbles. She alleges that she had received information that the soldier was dead. Pebbles says she told him she had procured a divorce. However that may have been, Pebbles and she were formally married and lived together as husband and wife until 1880, when Pebbles abandoned her and went to California, where he was still living in 1890, when the special examination was made. The soldier died in the almshouse at Dracut, Mass., on June 24, 1871. The claimant was married to Jonas Wilson Robbins on November 17, 1886. The claimant admitted to a special examiner in July, 1890, that she was married to Pebbles in 1866, but declared she ceased to cohabit with him as a wife when she learned that the soldier was still living, and thereafter lived with him in the capacity of a housekeeper only. It is admitted, however, that she was known in the community in which they resided as Mrs. Pebbles during the whole time they were living together, and this, taken in connection with the admission that they cohabited as husband and wife during a part of that time, is sufficient to raise a presumption that they continued to occupy the same relation to each other until they separated in 1880. There is no evidence except the claimant's statement to rebut that presumption; on the contrary there is considerable evidence to support it.

Emma J. Swan testified before the special examiner that Pebbles and the claimant came to her house together about 1878, and that they were living together as man and wife at that time.

Pebbles himself testified that they cohabited as man and wife up to the time he went to California.

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His son, George D. Pebbles, testified to the same effect.

Alvin Burleigh, an attorney at law, testified that in November, 1880, the claimant consulted him in regard to a justice suit brought against her by one John S. Robbins, with reference to her rights and interests, as wife of A. J. Pebbles, in the farm formerly owned and occupied by the latter. Affiant heard no question raised at any time as to the fact that she was Pebbles' legal wife. The business between them was under the presumption that she was the wife of Pebbles.

The claimant is attacking the validity of her marriage to Pebbles in order to secure a pension as the widow of Coburn. The law presumes in favor of the marriage. As was said in the case of Louisa C. Germain (11 P. D., 66):

> It may be assumed as a principle of well-nigh universal application that the presumption of innocence and legality obtains as to all proven marriages, and that in cases where one party has been shown, to have married twice, the presumption of the validity of both marriages obtains until the contrary is shown by competent proof. Where a second marriage is shown, the legal presumption at once arises that the first marriage had been dissolved, either by death or divorce, at the time the second was contracted.

It is admitted that the claimant's marriage to Coburn had not been dissolved by death at the time of her marriage to Pebbles, but it has not been shown that it had not been dissolved by divorce. On the contrary there is evidence that she claimed to have been divorced. The burden of proving that there was no divorce is upon her, and the proof has not as yet been furnished.

But, assuming that there was no divorce and that the marriage to Coburn stood as a bar to a legal marriage to Pebbles in 1866, the bar was removed by the death of Coburn in 1871, and the parties continued to live together and hold themselves out to the public as man and wife for nine years after that. The question then arises whether a valid marriage did not arise after the removal of the impediment, the matrimonial consent being presumable from their acts and it not being shown that the laws of the State in which they resided (New Hampshire) required a formal celebration.

There is, however, another phase of the case to be considered which presents more serious objections to the allowance of the claim than those already mentioned. It is clearly shown that the claimant for several years before the soldier's death (during part of which time, at least, she knew that he was alive) and for nine years thereafter passed as the wife of Pebbles. She cohabited with him, bore his name, and after he left her claimed a wife's interest in his property. In so far as she could, and with a full knowledge of the facts, she renounced her matrimonial connection with Coburn and proclaimed herself the wife of Pebbles. It has been held by the Department in several similar cases that a woman is estopped by such conduct from subsequently

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denying the validity of the second marriage in order to obtain pension as widow of the first husband. (See Digest of Pension and Bounty Land Decisions, p. 433, and cases therein cited.)

There can be no question that if the claimant were now living with Pebbles and holding herself out to the world as his wife she would not be permitted to draw pension as the widow of Coburn, upon showing that she was, in fact, not married to Pebbles; and this is true regardless of the statute of August 7, 1882, relative to adulterous cohabitation. It is simply unthinkable that the Government would pay her pension as the unmarried widow of one man knowing her to be living avowedly as the wife of another man. This being true, does it not follow that she is precluded from receiving pension for any past time during which she was living as and representing herself to be the wife of Pebbles.

If she had applied for pension prior to 1880, the Pension Bureau might properly have said: "You are the reputed wife of Pebbles; by your marriage to him in 1866 and by your continued cohabitation with him after you became aware that the soldier was still living (if indeed you ever really believed him to be dead) you are estopped from claiming to be the widow of the soldier. On the ground of public policy, if on no other, you will not be permitted to impeach your marriage to Pebbles and to convict yourself of bigamy and adultery in order that you may obtain a pension on account of the soldier toward whom you had, for years before his death, failed to perform the duty or recognized the obligations of a wife."

The reasons which would have justified the rejection of the claim at that time are equally potent to-day, having been in no way affected by Pebbles's desertion of the claimant. The rejection will therefore stand.

JURISDICTION—DECREE—EVIDENCE—DIVORCE.

ELIZABETH WILLIAMSON (WIDOW).

The decree of divorce obtained by the soldier in the State of Arkansas in 1879 against the claimant, who was in the State of Illinois, is void for the reason that the statutory requirement that the warning order should be published was not complied with.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 22, 1901.

Thomas G. Williamson, formerly lieutenant-colonel of the Tenth Indiana Volunteer Cavalry, died on January 23, 1882. On September 11, 1890, Elizabeth Williamson, as his widow, filed a declaration for pension under the provisions of the act of June 27, 1890. Her claim was adjudicated on August 5, 1897, and rejected on the ground that the soldier had procured a divorce from her on November 5, 1879.

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On March 11, 1901, the claimant filed additional evidence as a basis for reopening her claim, including a transcript of divorce proceedings had at the fall term, 1879, of the circuit court of Mississippi County, State of Arkansas. It appears that on September 2, 1879, the soldier filed a complaint for divorce in said court against the claimant, in which he alleged that they were married in the State of Indiana, and afterwards removed to the State of Tennessee, where they resided until about the 1st day of February, 1875, at which time the claimant willfully and without reasonable cause deserted him and resided separate and apart from him for two whole years and since, and that she is now residing somewhere, as he is informed and believes, in the State of Illinois. The soldier further alleged that he was a resident of Mississippi County, Ark., and had been for one year next before the filing of his complaint, and that his alleged cause for divorce occurred in the State of Tennessee, and was a legal cause for divorce in that State.

It also appears that on the day upon which said complaint was filed Messrs. McVeigh and Semmes, attorneys, were appointed to represent the nonresident defendant. Subsequently, said attorneys made a report and placed the same on file, which reads as follows:

> That some two months since, they wrote to the defendant at her post-office in Strasburg, Ill., informing her of the institution and nature of this action and asking for any defense she might have to make; and that, although they are advised that said letter was received, they have had no response from her; that they have examined the pleadings herein and see no reason why plaintiff should not proceed in the manner prescribed by law.

Upon the filing of said report it appears that the court adjudged and decreed that the bonds of matrimony heretofore existing between the plaintiff, Thomas G. Williamson, and the defendant, Elizabeth Williamson "be dissolved and held void and of no effect."

The claimant, in an affidavit, attacks this decree of divorce, setting up the following state of facts, in which she is corroborated by the testimony of the daughter and only child of the parties, Mrs. Cora Richman. She denies that she ever received any notice of the divorce proceedings prior to the rendition of the judgment; that she did not desert her husband as alleged by him in his complaint for divorce, neither did they ever reside in the State of Tennessee; that in 1876 their home was in Mattoon, Ill., where the soldier mortgaged their home for $500 and left, stating that he was going south into Tennessee where he could make more money; that, after he left, she received letters from him from Richardson's Landing, Tennessee; that in the fall of 1877, she and her daughter visited him while he was very sick and remained with him one month; that when they started to return home, the soldier took them to the boat landing and told them that he would be at home in six weeks; that he did not return to his home,

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and for that reason she was compelled to go to her father's at Strasburg, Ill.

The application for reopening the case was considered on April 26, 1901, and held to be insufficient, as the divorce proceedings were apparently regular, and that the defendant received constructive notice as contemplated by the statutory provisions of the State of Arkansas.

From this action appeal was taken on May 2, 1901, resting upon the contention therein set forth, as follows:

Relative to the claim of Mrs. Elizabeth Williamson, widow of Thomas G. Williamson, for widow's pension filed under the act of June 27, 1890, number 469179, lieutenant-colonel, Tenth Indiana Cavalry, also Mexican War, we hereby appeal from the action of the Commissioner of Pensions in rejecting it, August 12, 1897, on the ground that claimant was not the legal widow of the soldier, it having been shown that he was divorced from her November 5, 1879. Since the rejection we have filed a transcript of the record of the divorce proceedings and evidence, which shows beyond a doubt that the divorce in question was obtained fraudulently, inasmuch that claimant was never served by publication, or otherwise, as the law required. Furthermore the claimant *never lived in the State alleged* in the *petition*, and under the recent decision of the *Supreme Court* the divorce is nulled. We contend that the evidence filed since the rejection shows that this case is identical with the *Annie M. Shipp* case, *current number* 67, 11 P. D., 226, dated February 8, 1901, in which you reversed the action, and we respectfully request that the same action be taken in this case.

There is a statutory provision in force in the State of Arkansas that where the defendant in an action is a nonresident—

The clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order.

It is further provided by statute that—

The court may make the warning order upon the requisite facts being satisfactorily shown by affidavit or other proof. Warning orders shall be published weekly for at least four weeks.

It is also provided that in cases where a defendant has been thus constructively summoned an attorney shall be appointed thirty days before judgment, who shall defend and inform the defendant of the action. In this case the attorney seems to have been duly appointed, but the record of the proceedings does not disclose the fact that the warning order was "published weekly for at least four weeks" or for any other length of time.

It is a well-settled principle that, in divorce proceedings, where the defendant is beyond the territorial limits of the jurisdiction of the court in which the action is pending the statutory requirements must be complied with. This principle is expounded by the Supreme Court of the United States in the case of Cheely *v.* Clayton (110 U. S., 701). James W. Clayton had obtained a divorce in the Territory of Colorado against his wife, Sarah A., who was in the State of Illinois. The cause for divorce, as alleged, was to the effect that the plaintiff had taken

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the defendant to the State of Illinois in 1863, and that she had refused to return and live with him in Colorado.

Sarah A. Clayton, the divorced wife, describing herself as a citizen and resident of Illinois and widow and heir at law of James W. Clayton, deceased, brought suit in the circuit court of the United States for the district of Colorado to recover a tract of land in the county of Jefferson and State of Colorado and a lode mining claim and quartz mill in Gilpin County, in that State, and the rents, issues, and profits thereof. The case came before the Supreme Court of the United States on a writ of error to said circuit court.

The laws of the Territory provided for notice by publication, and also required the sheriff to serve the summons personally upon the defendant if found within his bailiwick. The supreme court of the Territory had decided that in such a case it was the duty of the sheriff to retain the summons in his hands until the return day, in compliance with a statutory provision which, in addition to service by publication, said:

> But this proceeding shall not dispense with the usual exertion on the part of the sheriff to serve the summons.

The sheriff in the Clayton case had made an entry of non inventus thirty days before the return day.

The supreme court of the State of Colorado, in a case in which the facts were similar, had held that—

> Without holding the writ until the return day and a proper return accordingly, the publication of notice will not avail to confer jurisdiction upon the court to render final decree upon the petition. (Vance *v.* Maroney, 4 Colorado, 47–49.)

The Supreme Court of the United States in the case of Cheely *v.* Clayton (110 U. S., 705-text) held as follows:

> The courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce, in accordance with its laws, for any cause allowed by those laws, without regard to the place of the marriage, or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. (Story on conflict of laws, sec. 230a; Cheever *v.* Wilson, 9 Wall., 108; Harvey *v.* Farnie, 8 App. Cas., 43.) If a wife is living apart from her husband without sufficient cause, his domicile is in law her domicile; and, in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication, in accordance with its laws, is valid, and although she never in fact resided in that State. (Burlen *v.* Shannon, 115 Mass., 438; Hunt *v.* Hunt, 72 N. Y., 218.) But in order to make the divorce valid, either in the State in which it is granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires.

This decision is in perfect harmony with the decision of the Department in the case of Emma H. Cooper (10 P. D., 434) and with that of Anna M. Shipp (11 P. D., 226).

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The statutory requirement that the warning order should be published was not complied with, and for that reason the decree of divorce is void.

The claimant's case is very much strengthened by the testimony taken on special examination in Strasburg, Ill., in 1897. The trend of that testimony is to the effect that the soldier abandoned his wife in Illinois, and voluntarily remained away from her, which rebuts the allegation in his complaint for divorce that she had abandoned him in the State of Tennessee.

For reasons herein set forth the action complained of is reversed, with directions that the case be readjudicated in accordance with this opinion.

NAVY PENSIONS—SECTIONS 4756, 4757, AND 4813, R. S.

WILLIAM FINLEY.

This pensioner, being an inmate and beneficiary of the Naval Asylum, Philadelphia, Pa., the money benefit of $13.25 per month, to which he was entitled under the section 4756, Revised Statutes, for twenty years' service in the Navy, and in lieu of which he accepted the home in the asylum, was paid to the governor of that institution, by virtue of section 4813, Revised Statutes. He was granted leave for six months in 1896, and during such leave was permitted to receive the $13.25 per month, in person. During this leave, also, he applied for and was allowed a pension of $8 per month for service in the Mexican war, under the act of January 29, 1887, but the first payment on this certificate, which included arrears from the date of the act, was paid to the governor of the asylum, by the pension agent, and pensioner was only allowed to draw the amount becoming due during the period of his leave from the asylum.

It has been held in a decision by the Comptroller of the Treasury (3 Dec., Comp. of Treasury, 568), that—

"Section 4813, Revised Statutes, requiring the pension of any navy officer, seaman, or marine entitled to a pension to be paid to the Secretary of the Navy during his continuance in a navy hospital only applies to such pension the benefit of which the pensioner was actually receiving at the time he was in the hospital, and does not include a pension acquired after he left the hospital."

Following this ruling, while the pensioner was still constructively a beneficiary of the asylum, although on leave, yet he was not actually an inmate, and the recognition by the asylum authorities and pension agent of his right to draw his pension during the period of such absence carried with it the right to draw all of such pension, including the arrears under the Mexican war act, title to which was determined while he was not an inmate of the asylum. The payment of such arrears to the governor or treasurer of the asylum was erroneous, and to this extent the appeal is sustained. Other points in the appeal are overruled in accordance with former decisions (John Spencer, 7 P. D., 152; Richard Ewing, 8 P. D., 44), except in so far as the scaling clause of section 4757, Revised Statutes, is made to apply to section 4756, Revised Statutes.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 25, 1901.

William Finley, late captain of forecastle and seaman, United States Navy, and Mexican War survivor, after a service of more than twenty

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years, was honorably discharged May 9, 1873. Soon thereafter he became an inmate and beneficiary of the United States Naval Asylum, Philadelphia, Pa., by virtue of the law creating said institution. While such inmate he filed, March 30, 1881, an application for an allowance under the provisions of section 4756, Revised Statutes, which is as follows:

There shall be paid out of the naval pension fund to every person who, from age or infirmity, is disabled from sea service, but who has served as an enlisted person in the Navy or Marine Corps for the period of twenty years, and not been discharged for misconduct, in lieu of being provided with a home in the Naval Asylum, Philadelphia, if he so elects, a sum equal to one-half the pay of his rating at the time he was discharged, to be paid to him quarterly, under the direction of the Commissioner of Pensions; and applications for such pension shall be made to the Secretary of the Navy, who, upon being satisfied that the applicant comes within the provisions of this section, shall certify the same to the Commissioner of Pensions, and such certificate shall be his warrant for making payment as herein authorized.

The Secretary of the Navy having certified to the Commissioner of Pensions the facts in the case a certificate was issued in the claimant's favor for $13.25 per month, being one-half his pay while in active service. This certificate was dated July 5, 1881, and the allowance thereunder was paid to the governor of the asylum, as the agent of the Secretary of the Navy, under the provisions of section 4813, Revised Statutes, as follows:

Whenever any navy officer, seaman, or marine, entitled to a pension, is admitted to a navy hospital, the pension, during his continuance in the hospital, shall be paid to the Secretary of the Navy and deducted from the account of such pensioner.

The pensioner or beneficiary obtained leave of absence from the asylum April 1, 1896, which, with extensions, continued six months, or to October 1, 1896. During this period he was permitted to draw the allowance of $13.25 per month upon his own voucher, the certificate being turned over to him for that purpose. This was in accordance with a regulation of the asylum, of which it is stated:

Although so connected with the home as to be borne upon its rolls as a beneficiary, and wearing clothing previously supplied as such, and at liberty to return at any moment, any beneficiary is allowed to draw for his own use that portion of his pension accruing during such period.

This regulation is in strict pursuance of the terms of the two sections before quoted, the one providing that if he so elects he may take the allowance of money in lieu of a home in the asylum, and the other providing that only while he continues in the home or hospital shall his pension be paid to the Secretary of the Navy and be deducted from his account. It is true that the language of the regulation seems to warrant the inference that the beneficiary was still regarded as an inmate of the asylum, although on leave, but this is not material in view of the fact that his separation from the asylum for even a short time is recognized as entitling him to have his pension certificate and

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to draw his pension thereon from the pension agent. But this subject and the effect of the recognition thus accorded the beneficiary will be referred to later.

Immediately after his leave began pensioner filed, April 3, 1896, a claim for pension as a survivor of the Mexican war, under the provisions of the act of January 29, 1887. Such claim was allowed June 18, 1896, at a rating of $8 per month, to commence from the date of the act. In issuing the certificate for said pension it was made to cover both amounts, viz, the $8 per month and the $13.25 per month, thus making a pension of $21.25 per month. But the first payment on this certificate, including arrears, which amounted to more than $800, was not made to the pensioner himself, but to the governor or treasurer of the Naval Asylum. The pensioner, however, was allowed to draw that portion of his pension accruing during the time he was on leave, but no longer, the privilege ceasing with his return to the asylum.

This action of denying him the arrears of his Mexican War pension, or any portion of such pension while he was in the asylum, is assigned as error in an appeal entered November 20, 1897. But while this constitutes the principal contention another of almost equal importance, maintains that, under section 4766, Revised Statutes, even the former allowance, or service pension under section 4756, Revised Statutes, should not be paid to the asylum authorities except to be held in trust for him until he should leave the institution. In support of these contentions others, in the nature of arguments, are made, as, that the Naval Asylum is not a hospital in the sense used in section 4813, Revised Statutes; that, in any event, the latter section has become inoperative, if not, in effect, repealed by reason of later legislation which changes the conditions under which the section applied; that the money benefit named in section 4756, Revised Statutes, is not strictly a pension, and that appellant certainly has the right to receive one or the other of the allowances even while in the asylum.

Other points incidental to the main issues are referred to in the appeal, and comment and argument are offered to sustain them. Indeed, these comments go so far as to constitute charges of misconstruction, or worse, against the Bureau of Pensions and the Navy Department. As a matter of fact this appeal is elaborated to such extent that an attempt to meet and discuss fully all the matters mentioned therein would not only open up the whole subject of naval pensions and naval hospitals—their origin and history—but would make this paper of excessive length. However, it may be necessary as a preliminary to the determination of the principal question to dispose of some of the incidental matters in as brief a way as possible. Fortunately this task is lightened by the fact that the subjects involved are not altogether new, but have been discussed in former decisions in response to appeals by the same attorney who prepared this one.

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Two of the most notable of these decisions are published—cases of John Spencer (7 P. D., 152) and Richard Ewing (8 P. D., 44). In the first of these it was held on points applicable to the present case that the money benefit granted by section 4756, Revised Statutes, is a pension, and that such pension is and was intended to be a "further provision for the support" of the beneficiaries therein specified, in addition to pensions granted by other laws; also, that the prohibitions in section 4715, Revised Statutes, and the proviso to the second section of the act of June 27, 1890, are inapplicable and constitute no bar to the payment of the benefit provided by section 4756, Revised Statutes, and of pension under other grants; and, further, that in a case where both the money benefit under the section named and pension under other laws are granted the former should be scaled to one-fourth the amount of the latter, as indicated by the last clause of section 4757, Revised Statutes.

In the other decision cited it was held that the Naval Home, or Asylum, at Philadelphia, is a naval hospital within the meaning of section 4813, Revised Statutes, and pensions due to inmates thereof must, under the provisions of said section, be paid to the Secretary of the Navy; also, that section 4766, Revised Statutes, has no application to said section 4813, Revised Statutes, and the payment to the Secretary of the Navy provided for therein; and, further, that there is no provision of law for requiring the officials of the Naval Asylum to hold in trust the benefits and pensions granted by section 4756, Revised Statutes, and other laws, although there are provisions of that nature in regard to inmates of the National Home for Disabled Volunteer Soldiers.

Reviewing these decisions, and the basis upon which the several points are settled therein, it is found that, except in a minor particular, they are sustained by the plain provisions of the statutes under accepted rules of construction as well as by sound reason and logic, so that additional elaborate comment is unnecessary to apply the rulings to the case at bar. That the provision of money in section 4756, Revised Statutes, for long and faithful service is a pension to all intents and purposes is hardly open to question; and the reasons for so regarding it, as stated in the Spencer case, namely, that it is a gratuitous allowance and conforms to all the definitions of a pension, and that it is called a pension in the statute itself, outweigh any arguments against it. This money benefit is certainly not a debt due the beneficiary. It is based upon no sort of contract, and it can not be placed in the same relative position as retired pay to officers, because there is no provision of law analogous to that which provides for the latter. It is simply a manifestation of the bounty of the Government based on gratitude and appreciation of faithful service, as in the grant of all other pensions. It is only different from other pensions in that it

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has respect alone to the length of service of the beneficiary and his age or infirmity, and provides a specific sum for aiding in his maintenance, based on his pay while in active service, and does not place him in the category of those whose ratings are fixed by a schedule or dependent on some fact to be ascertained. It is as if a special act of Congress were passed in relation to each of such beneficiaries. The statute is, indeed, of the nature of a special act for a particular class.

Yet, it is true that while, as a matter of fact, the money benefit provided by section 4756, Revised Statutes, is a pension, it is of a different order or class from those provided by other laws of general application, and because of this, as well as because the provision does not seem to exclude the beneficiary from the additional or concurrent benefit of such other laws, that it has been held his case is not affected by the prohibition of section 4715, Revised Statutes, which forbids the allowance of more than one pension at the same time to the same person. Indeed, the act of March 2, 1867, which includes both sections 4756 and 4757, Revised Statutes, appears to expressly recognize the right of the beneficiaries thereunder to concurrent pension under other laws. If, then, this appearance of such recognition is not deceptive, and if the view that the statute is in the nature of a special act is correct, the prohibition of section 4715, Revised Statutes, does not apply, nor does that in the fifth section of the act of July 25, 1882, as follows:

> That no person who is now receiving or shall hereafter receive a pension under a special act shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law.

Of this section it may be stated that the exception contained in the latter clause applies with especial force to the case under consideration. That is, the act of March 2, 1867 (a special act), under which pension is being received, "expressly states (or implies) that the pension * * * is in addition to the pension which said person is entitled to receive under the general law," namely, his Mexican War pension.

As for the holding in the Spencer case that when allowance is made of additional pension under other laws the money benefit of sections 4756 and 4757, Revised Statutes, should be not exceeding one-fourth the rate of such pension, it may be stated that after a careful examination of the provisions it seems unmistakable that such scaling is applicable alone to the benefit named in the latter section (4757), in which it is provided for. It is true the two sections are parts of one act—that of March 2, 1867—but the one is in the nature of a proviso to the other, and makes an entirely separate and distinct grant to a different set of persons of similar class, based upon similar but distinct grounds and provides a very different mode of ascertaining title thereunder. Besides, the very terms and position of the scaling clause imply that it has relation to the provision for those whose service was

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ten years or more, but less than twenty. After specifically describing how the title of such set of persons shall be ascertained and pension allowed, it declares "that no allowance so made shall exceed," etc., whereas the provision of the chief portion of the act (section 4756, Revised Statutes) is simply for a sum of money in lieu of a home in the Naval Asylum (which the beneficiary is entitled to under another law), without other method of ascertaining title than the statement of his service from the records and that he is unfit for sea service, and it is dependent in no way upon the recommendation of a committee. Again, it is true, as stated in the decision of the Spencer case, that "sections 4756 and 4757, are undoubtedly to be construed in pari materia," upon the question of their relation to section 4715, Revised Statutes, but there is no good reason for confounding their provisions as regards the scaling of the benefits named in each. In other words, the beneficiary under section 4756, Revised Statutes, is entitled to the whole amount of the half of his pay while in active service in addition to any pension he may receive under other laws, while the beneficiary under section 4757, Revised Statutes, must, in case he is granted pension under other laws, forfeit the "suitable amount for his relief" recommended and allowed, and take in lieu thereof the pension and one-fourth of the same added. And, in so far as the holding to the contrary in the Spencer case might apply to the case under consideration, it is overruled.

Now, as touching the question whether the Naval Home, or Asylum, at Philadelphia is a naval hospital, a succinct and sufficient answer is given in the reasons for holding the affirmative, in the decision of the Ewing case, supra. These reasons are as follows:

1. Because its establishment was provided for in an act entitled "An act establishing navy hospitals," and, conformably to the terms of said act, it was erected on one of the sites selected for navy hospitals and from the fund set apart for navy hospitals.

2. Because Congress has appropriated money for its improvement and repairs as a navy hospital. (9 Stat. L., 625, and 11 id., 47, 245, and 406.)

3. Because it falls within the definition of "hospital" given by lexicographers.

4. Because the Secretary of the Navy holds it to be a navy hospital. This, in itself, is considered a sufficient reason, so far as this Department is concerned, because the Secretary of the Navy is the proper person to decide the status of the several branches of his own Department.

If more detail of statement were required it might be recited how, by an act passed July 16, 1798, Congress created a marine-hospital fund by requiring the deduction of 20 cents a month from the pay of all seamen of vessels entering the ports of the country; how, by the act of March 2, 1799, the objects and resources of said fund were extended to the Navy of the United States, with a like deduction from the pay of officers, seamen, and marines, and the subsequent merging of the "marine-hospital fund" into the "fund for navy hospitals;" and how by the act of February 26, 1811, these navy hospitals were

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authorized and provided for by adding to the fund the fines imposed upon officers, seamen, and marines, and by creating a board of commissioners to select sites for the hospitals and to set apart one of them as a permanent asylum for disabled and decrepit officers, seamen, and marines.

It will be readily understood, therefore, that such asylum (afterwards established at Philadelphia, Pa.) was instituted for the same object and purposes and is subject to the same rules and regulations as other naval hospitals. Furthermore, the last paragraph or provision of said act of February 26, 1811, contains the requirement of section 4813, Revised Statutes, that "when any officer, seaman, or marine entitled to a pension shall be admitted into a navy hospital the pension, during his continuance therein, shall be paid to the commissioners of the navy hospitals and deducted from the account of such pensioner." As far as this requirement goes, then, it is clear that it applies equally to the Naval Asylum at Philadelphia as to any other naval hospital.

Besides, this matter is now settled beyond controversy, however it may have been regarded heretofore, by the acts of Congress enacted May 4, 1898, and March 3, 1899, making appropriations for the support of the Naval Home at Philadelphia, as follows:

> And whenever any officer, seaman, or marine entitled to a pension is admitted to the Naval Home at Philadelphia, or to naval hospital, his pension, while he remains there, shall be deducted from his accounts and paid to the Secretary of the Navy for the benefit of the fund from which such home or hospital, respectively, is maintained; and section forty-eight hundred and thirteen of the Revised Statutes of the United States is hereby amended accordingly.

This provision likewise answers the contention of the appeal that section 4813, Revised Statutes, had been repealed or had become inoperative. It is clear that Congress did not so regard it, and it is unnecessary further to notice the arguments made upon this point. Further, the provision confirms the holding in the decision of the Ewing case, hereinbefore cited, as to the effect, or rather the lack of bearing of the prohibition in section 4766, Revised Statutes, upon the direction in section 4813, Revised Statutes, as to the payment of pensions of inmates or beneficiaries of the Naval Home. The prohibition referred to is as to the payment of pension to any person other than the pensioner entitled thereto, and the contention is that said prohibition repealed all previous directions in regard to the payment of pensions. The holding in the decision cited is as follows:

> The purpose of the act of July 8, 1870 (sec. 4766, Rev. Stat.), is very plain. It was designed to prevent claim agents, attorneys, brokers, and other persons from getting possession of pension money due their clients and appropriating it to their own use. It was not designed to change existing provisions of law with respect to the payment of pensions to soldiers or sailors who were inmates of homes or hospitals provided at public expense.

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As stated, the provisions of the recent appropriation acts, as quoted, appear to confirm the above ruling, in intent if not in words, and the Secretary of the Navy (or the governor of the asylum, for him) is the proper person to receive whatever pension may be granted to the beneficiary while in the asylum. Not only so, but all pension due such beneficiary must be so paid and not the money benefit provided by section 4756, Revised Statutes, only, as contended in the appeal. It has been seen that this money benefit is of a different order of pension from any granted under other laws, and is allowed only in lieu of a home in the Naval Asylum. It naturally ceases to go to the beneficiary when he accepts such home. It may be a question of some moment whether the said money benefit can be properly paid to anyone during the time the beneficiary is an inmate of the asylum. This, however, is not a matter for consideration here, being exclusively within the jurisdiction of the Secretary of the Navy.

As for any other pension to which the beneficiary may be entitled, however, there can be no serious doubt but the same is payable to the Secretary of the Navy (or the asylum authorities) while such pensioner is an inmate and is being maintained in the institution. The direction of the law (sec. 4813, Rev. Stat.) does not discriminate as to the kind of pension, or between the pension under the general law and the money benefit provided in lieu of a home, but it is general in its scope and must be taken to include all pension, of whatever character, to which the beneficiary of the asylum is entitled. So, in the case under consideration, it is held that the payment to the asylum authorities of the Mexican War pension while the pensioner is an inmate, is proper and conformable to the law.

Thus, having disposed of the various incidental contentions of the appeal the further consideration of the case reverts to the chief and only remaining contention. This relates to the fact that the pension for service in the Mexican war was applied for and allowed while pensioner was not an inmate of the Naval Asylum, but it was nevertheless paid to the governor of said institution. It is insisted that whatever may be the rulings on the other points mentioned, this pension should have been paid to the pensioner in person by the pension agent. In support of this contention is cited the decision of the Comptroller of the Treasury in the case of Robert Kelly, dated May 4, 1897. This decision is contained in a communication to the pension agent at Philadelphia, Pa., and, being short, is given here in full, as follows:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
May 4, 1897.

SIR: Your letter of the 14th ultimo stating that one Robert Kelly, a ship's corporal, who at various intervals between February 3, 1888, and August 15, 1896, had been an inmate of the naval hospital at Philadelphia, was on February 23, by certificate

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No. 5939, granted a pension which related back to and covered the period of time he was receiving the benefit of the hospital, and asking whether you should pay the pension so granted to the pensioner or the Secretary of the Navy, has been received.

The rights of the parties in the matter are to be determined by the state of affairs that existed at the very time said Kelly was in the home.

Section 4813 reads: "Whenever any navy officer, seaman, or marine, entitled to a pension, is admitted to a navy hospital, the pension, during his continuance in the hospital shall be paid to the Secretary of the Navy and deducted from the account of such pensioner."

The point in the case turns upon the construction to be placed upon the words "entitled to a pension." The act is expressed in the words of the present tense, and therefore it is fair to presume that Congress had in mind such a pension only as the pensioner was, at the time he was in the home, actually receiving the benefit of, and not an inchoate contingent right that might or might not ripen into a pension in the future; and to extend the application of the statute so as to include a pension acquired after he had left the home would require a construction not warranted by the language used.

You are therefore authorized to pay the pension to Mr. Kelly instead of to the home. (Decisions of Comptroller of the Treasury, 3, 568.)

This would seem to be very good authority for allowing the contention of this appeal last referred to. It will be observed that two points especially are covered by said decision, viz, that it is only while pensioner is an inmate of the Naval Asylum that his pension may be paid to the governor, and not to himself, and this pension must be one in esse and not in futuro—that is, title to the same must have been declared while he was yet in the asylum, and is not inchoate and dependent on facts to be proved and judgments to be rendered.

But with this much admitted, and thus far recognizing the authority of said decision, the question arises, was an error made in paying the pension in this case—that is, the Mexican War pension to the governor of the Naval Asylum? The settlement of this question depends on the answer to another, viz, was pensioner an inmate or beneficiary of the asylum at the time his title to this pension was determined? And herein lies the whole gist of the case, because if he was not, the decision quoted may be said to control, while, if he was, section 4813, Revised Statutes, must be held applicable to the first payment of pension, as well as to any other while he was in the asylum.

The question above indicated seems very simple of solution, but it presents some difficulty when considered in its full import. There is a difference in the status of this pensioner, William Finley, from that of Robert Kelly, in which the quoted decision was made. In the latter case, although Kelly had been off and on an inmate of the Naval Asylum or hospital for eight years, his connection therewith had been finally severed at the time his title to pension was determined, so that he could not be said to be under its order or control in any manner, and being free to act for himself, he was entitled to receive his pension in person, unless by construction of the statute, he had been declared a debtor to the asylum, which is not the case.

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This pensioner, Finley, is not in the same category with Kelly, and the reasons above stated for paying him his pension in person do not strictly apply. There has been no final severing of his relations with the asylum. He was only on leave for a stated period and has been an inmate since that leave expired. It may be said then, that he was constructively a beneficiary of the institution even while on leave. Or at least, he was subject to the order of the authorities there, was carried on the rolls, was wearing clothes furnished by the asylum, and was free to return to its shelter whenever he chose to do so. To all intents and purposes then, he was in the status described by the statute (4813, Rev. Stat.) in the language, "during his continuance in the hospital," although not literally an inmate. On such a basis, therefore, the payment of the pension to the governor of the asylum would seem to have been proper and sustained by the law.

But there is another view which has been recognized by the asylum authorities and the pension agent, and which would appear to be good basis for holding that he was entitled to receive the first payment of his Mexican War pension and all other payments due while he was actually out of the asylum. This consists in the fact that notwithstanding he was constructively a beneficiary of the institution while on leave, he was allowed during such leave to draw the money benefit of $13.25 per month, under section 4756, Revised Statutes, and, after the first payment on his Mexican War certificate was made, he was allowed all that became due thereon during the period of his leave. There seems no good reason, therefore, why he should not have been permitted to receive the first payment as well. It could only be denied on the theory indicated in the Comptroller's decision, before quoted, that this first payment "related back to and covered the period of time he was receiving the benefit of the hospital," and which was ruled against as untenable in law.

If, therefore, the right of the pensioner to receive his current allowances for and during the time he was not actually an inmate of the asylum placed him, by such recognition, virtually on the same basis as the Pensioner Kelly, in the case quoted, then the pension agent should have paid him the whole amount due him while thus on leave, and the governor of the asylum could not rightfully take and withhold the sum for arrears, which became due after the pensioner ceased to be an inmate of the institution.

There are good reasons for believing that pensioner's chief object in seeking leave and absenting himself from the asylum for the period named was for the purpose of applying for and personally receiving this arrears of pension under the Mexican War act, thus preventing the asylum authorities from taking this large sum, by virtue of section 4813, Revised Statutes. But, while this may have been the case, it can not be held to nullify his right to the money which, under the rulings and recognition mentioned, legally belongs to him.

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Considering the case, then, in all its aspects it is held that the payment of the arrears of pension under the certificate for service in the Mexican war to any other person than the pensioner himself was erroneous and should be rectified. To this extent the action appealed from is reversed.

JURISDICTION—DECLARATION—EVIDENCE—FILING.

ANTHONY O'GRADY, ALIAS JOHN DAVIS.

1. A declaration for pension is of no force or effect whatever until filed in the Bureau of Pensions.
2. The actual mailing of a declaration for pension, addressed to the Commissioner of Pensions, is not sufficient proof that the same was ever filed in the Bureau of Pensions; neither does such mailing raise any presumption that said declaration had been filed in said Bureau.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 25, 1901.

Anthony O'Grady, alias John Davis, was granted a pension of $8 per month under the act of June 27, 1890, on December 31, 1898, declaration having been filed on September 30, 1897. He was a private in Company F, Nineteenth Massachusetts Volunteer Infantry. An appeal was filed on January 30, 1899.

It appears that this claimant had a charge of desertion against him on the records of the War Department, and that upon the refusal of the said Department to remove said charge an act of Congress approved February 1, 1897, ordered said charge to be removed and soldier granted an honorable discharge to date from April 30, 1865.

It is contended by the attorney that some time in 1890 he filed a declaration under the act of June 27, 1890, for this claimant and was advised by the Commissioner of Pensions that his claim could not be favorably considered while the charge of desertion remained of record; that upon the removal of said charge as aforesaid he called up the claim and was advised by the Commissioner of Pensions that no declaration under the act of June 27, 1890, had ever been filed in behalf of claimant. He thereupon filed a declaration on September 30, 1897. The claimant was granted a pension from said last-mentioned date, but the attorney now claims that the date of commencement of said pension should be that on which he filed his original declaration in July, 1890.

The evidence shows, by the testimony of the claimant, his wife, and the appealing attorney, that shortly after the passage of the act of June 27, 1890 (the claimant having a general law claim on file), claimant's wife went to the attorney's office in Joliet, Ill., the claimant being in Colorado, and asked if her husband could not obtain his pen-

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sion under the new law. A declaration was forwarded to the soldier, but neither of the three witnesses can swear positively as to whether it was returned to the attorney or to the claimant's wife. The attorney swears that it eventually came into his hands, and that it was shortly afterwards forwarded to the Commissioner of Pensions. He does not swear that he mailed it, but states in his appeal that he gave it to claimant's wife to mail, that she did mail it, and that she has so sworn. It is not a fact, however, that she has so sworn, her affidavit stating—

> I do well remember that my husband's attorney (Mr. Hoover) told me when I called on him late in August, 1890, that my husband's claim was sent to Washington, and sometime after he told me that he got word from the Commissioner that no attention could be paid to my husband's claim until he got an honorable discharge.

It was demonstrated in the opinion in the case of Asa H. Dilley (11 P. D., 257), that a claim has no legal effect until it is filed. Even if papers are actually deposited in the mail, such an act does not constitute a filing of the papers. It is not until the papers have actually reached, and are in manual possession of the proper officer or office, that they can be said to be filed. The making out of the papers simply shows the intent to assert the claim, and the actual mailing of them is but another step in the intention to assert; the actual assertion, as is shown in the Dilley case, is not completed, and does not have any force so far as the party is concerned against whom the claim is asserted, until the papers are actually filed. Notice can not be brought home to one against whom a claim is made, save by the prescribed statutory methods, and in pension claims the procedure is by the filing of the declaration.

It is claimed in the appeal that the "correspondence indicates that the claim was received in the mailing department and has been lost." Such a contention has no foundation, however, in fact, for there is nothing in the correspondence which would indicate the slightest admission on the part of the Commissioner of Pensions that a declaration by the claimant under the act of June 27, 1890, was ever received prior to September, 30, 1897.

If the claimant can show that such a declaration as the one in question was ever in the possession of the Commissioner of Pensions, he would then have laid a proper foundation for building up a case. He has not shown such fact, and it is reiterated that, even if he should conclusively show that the declaration was actually placed in the United States mail, properly stamped and directed to the Commissioner of Pensions, such a showing would not be any proof whatever, neither would it raise the slightest presumption, that said declaration was ever filed with the Commissioner of Pension. As stated in the Dilley case, contractual rights are often saved and bound by depositing certain papers in the mail. A right to pension, however,

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is not a contractual right, and the principles which govern contract rights, so far as mailing papers are concerned, are not applicable to declarations in pension claims.

The opinion in the Dilley case held that a declaration which did not reach the Commissioner of Pensions until after the death of the soldier who had executed such declaration could not be a pending claim at the death of said soldier. This opinion in the case under discussion is meant to hold, and does hold, that the actual mailing of a declaration is no proof whatever that said declaration was ever filed in the office of the Commissioner of Pensions, neither does the mailing of it raise any presumption, however slight, that said declaration was filed in the office of the Commissioner of Pensions. Notice to the Government can only be brought home by the actual filing of the declaration, and proof of such filing can not be made by showing that the declaration was actually mailed.

By reason of the above it is held that the date of commencement of pension in the within case was properly made at the date of the actual filing of the declaration on September 30, 1897.

It is remarked that claimant has not made out a case even under his own contention, for he has not shown that the supposed declaration was ever mailed.

Action affirmed.

ATTORNEYSHIP—RECOGNITION.

JOSEPH LANE, ALIAS JOSEPH SIMPSON (CLAIMANT).

E. S. WEEDEN (ATTORNEY).

When the Bureau has adjudged that one of several contesting attorneys is entitled to recognition, and such others acquiesce in said decision, further recognition can not be denied the one and accorded to any of such others on the ground that the one did not conform to the rules in regard to formal service at a time prior to the decision of the Bureau upon which his title to recognition is based.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 25, 1901.

E. S. Weeden, of Chicago, Ill., on March 21, 1901, entered an appeal from the action of the Bureau denying him further recognition in the claim for pension, under the general law, of Joseph Lane, alias Joseph Simpson, who served in Company B, Eighteenth Kentucky Volunteer Infantry.

In behalf of the soldier on February 28, 1888, the appellant filed a declaration for pension, under the general law, on account of disability due to rheumatism, chronic diarrhea, and resulting piles. He filed evidence on January 27, 1890, which prima facie completed the claim.

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George Bancroft & Co., of Washington, D. C., on February 15, 1893, filed a power of attorney. They were called upon for evidence April 23, 1893; November 19, 1894; and January 2, and February 15, 1895. They filed evidence November 20, 1893; February 23, July 17 and 25, August 8 and 29, and December 11, 1894; and April 13, 1895.

On January 31, 1895, Mr. Weeden was notified that he would not be further recognized. From this action he entered an appeal March 9, 1895. The Bureau, in report dated March 20, 1895, receded from its action denying the appellant further recognition, and on March 22 following, said appeal was dismissed.

The Bureau on March 20, 1895, notified Messrs. Bancroft & Co. that they would not be further recognized, and on October 10, 1895, called upon appellant for certificate of the official character of W. J. Cowan, as justice of the peace. Said call was complied with November 4, 1895. On November 18, 1896, Mr. Weeden was notified by the Bureau that the claim required further special examination. The claim was specially examined during the years 1896, 1897, 1898, and 1900. Subsequently to 1895 appellant called up the claim several times. The claim was rejected February 14, 1901, when Messrs. Bancroft & Co. were recognized; hence this appeal.

Messrs. Bancroft & Co. acquiesced in the action of the Bureau of March 20, 1895, denying them further recognition. The call upon them by the Bureau of February 15, 1895, was for claimant's statement as to service and this they filed April 13, 1895. Thereafter, they filed no evidence nor performed any material service. As they were recognized and subsequently were denied recognition by the Bureau, and inasmuch as they have acquiesced in such action—that is, they never have entered any appeal from said action—they forfeited whatever rights they may have had in the claim (case of John Quinn, 11 P. D., 25).

The action (from which this appeal is entered) by the Bureau denying the appellant further recognition is upon the ground that from the time he prima facie completed the case, January 27, 1890, to June 16, 1894, the date of the decision of the Department in the case of John S. Keisor (7 P. D., 558), he did not call up the case at intervals of one year, and therefore became in neglect, so that Messrs. Bancroft & Co. could be recognized. Such service is merely formal. It has been pointed out that Mr. Weeden at once entered an appeal from the action of the Bureau denying him further recognition; that Messrs. Bancroft & Co. acquiesced in the subsequent action of the Bureau denying them further recognition, and that the latter had forfeited whatever rights they may have had. The cause now assigned for denying appellant recognition is founded upon alleged neglect by him during a period prior to the date when he was first denied recognition and from which the Bureau receded. It is presumed that appellant's right to recognition at such time is unquestionable. At this date inquiry can not be

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made as to whether appellant observed the rules as to mere formal service, whatever the fact may have been, for the Bureau at the proper time adjudged that he had preserved his rights. This question was in the province of the Bureau to decide, and having passed upon it and no person having excepted to its decision, its action would be worth little if the rights of an attorney founded upon such decision could be sacrificed by raising a query at any future period as to whether said attorney had observed the rules as to mere formal service, whether or not there was any other attorney who could have a better title to recognition.

It appears that from a time prior to the date when the claim was sent into the field appellant had been the recognized attorney and that at the time or since there has been no one to contest his rights. For the reasons set forth action denying the appellant further recognition was error.

It is directed that a copy of this decision be served upon Messrs. Bancroft & Co.

Action reversed.

SPECIAL ACT—COMMENCEMENT—RANK—SECTION 4702, R. S.

CORINNE R. STRICKLAND (WIDOW).

The soldier having been declared by special act of Congress to be an officer in the military service of the United States, and given the right to prosecute a claim for pension under the general law, although he is not shown to have been mustered nor recognized by the War Department, and having been pensioned under the general law at total of rank for disability contracted in service, the status and privilege extend to the widow, and she is pensionable under the general law if the officer's death was the result of the disability for which he was pensioned, as provided by section 4702, Revised Statutes.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 29, 1901.

Corinne R. Strickland, widow of Jesse H. Strickland, late colonel Eighth Tennessee Volunteer Cavalry, filed her applications April 4, 1899, for pension under the general law, and the act of June 27, 1890, alleging the death of her husband March 27, 1899. Both claims were rejected July 15, 1899, on the ground that the alleged service of the soldier had never been recognized by the War Department; that the records of said Department fail to show that he was in the military service of the United States, either as an enlisted man or officer; and, further, that the claimant is not entitled to benefit under the special act of Congress passed for the relief of this soldier.

Then a special act of Congress was enacted in behalf of the claimant. This was approved March 1, 1901, and is as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension

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laws, the name of Corinne R. Strickland, widow of Jesse H. Strickland, late colonel Eighth Regiment Tennessee Volunteer Cavalry, and pay her a pension at the rate of $30 per month.

In the adjudication for the purpose of carrying out the provisions of said act the pension was made to commence from the date of approval. From this action appeal has been taken April 3, 1901, upon the contention that the pension should commence from the date of the soldier's death. In this appeal also are recited the principal facts relative to the history and grant of pension to the soldier, and it is insisted that claimant is entitled to the benefit of the act for his relief. That act was approved August 30, 1890, and is as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to place on the pension roll, subject to the provisions and limitations of the pension laws, the name of Jesse H. Strickland, formerly colonel of the Eighth Regiment of Tennessee Cavalry, United States Volunteers, and for the purpose of prosecuting a claim for pension said Jesse H. Strickland shall be considered as having been duly commissioned and mustered as colonel of the said regiment to date from the thirtieth day of January, eighteen hundred and sixty-three.

That act was made necessary by the rejection of the soldier's claim under the general law for the same reasons that this claim of the widow was rejected, viz, that he was never mustered into the military service nor recognized as an officer by the War Department. The claim also had a similar fortune to the widow's in regard to the commencement of pension under the act—that is, the date of approval of the act was made the date of commencement of pension. Upon appeal being made, however, the action was receded from and the appeal was dismissed with the understanding that the claim would be adjudicated under the general law. This was done subsequently, and the pension was commenced from the date of filing the claim on account of disability from rheumatism and resulting disease of heart.

However, in fixing the rate of pension it was placed at one-fourth the total of his rank, or $7.50 per month, from date of filing claim to date of approval of act, and total thereafter. Again appeal was made, insisting that the rating should be total for the whole period; and said appeal was sustained in a decision rendered March 23, 1891, it being directed that the rating of total, or $30 per month, be allowed from date of filing claim. In this decision it was pointed out that the adjudication of the claim was under the general law, based upon the enabling clause of the special act (before quoted), and this being true the rate of pension must be adjusted in accordance with the degree of pensionable disability shown; and, further, that the evidence warranted the allowance of the rate of $30 per month for the period between date of filing claim and date of the special act fully as much as it did for the period subsequent to the latter date. The claim was thereupon adjudicated in accordance with said decision.

From the foregoing it will be perceived that the issue in the present

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case is whether the adjudication should be upon the same principle as in the invalid claim, and the pension be made to commence from the date of the soldier's death. In other words, whether this claim of the widow should be adjudicated under the provisions of the general laws, regarding her husband as an officer in the military service of the United States, conformably with the special act for his relief, and extending to her the benefit of the enabling clause in reference to the prosecution of his claim, or whether she should be held to the strict terms of the special act enacted in her behalf March 1, 1901? If the latter, then the date of commencement as fixed in the adjudication is correct, because section 4720, Revised Statutes, provides that when a pension is granted by special act the commencement thereof shall be from the date of the act, unless by its express terms a different date is fixed.

It can not be held, though, that claimant is restricted to the pension under the special act, provided she establishes title under the general law. In that event she can choose which pension she will take. Then, the only question to be determined is whether she is in the same relative position as her husband in reference to prosecuting her claim. That this must be decided in the affirmative there can be little doubt, because section 4702, Revised Statutes, provides that the widow of any person who is entitled to pension under the general law (secs. 4692 and 4693, R. S.) shall be entitled, in case he dies of disability contracted in service, to receive the same pension that he would have received had he been totally disabled. This claimant's husband was pensioned under the general law for certain disabilities. If the evidence shows he died of said disabilities then she is entitled under the same law to total pension.

And the fact that said husband was not recognized as an officer by the War Department, but was declared to be such by the special act of Congress, and in like manner enabled to prosecute his claim as such officer, can not operate to take away any of claimant's rights under said section 4702, Revised Statutes. The same status and privilege conferred upon the husband in the special act necessarily remains and inures to the benefit of the claimant in the prosecution of her claim. In short, when by the act of Congress the husband was declared an officer of the Army and entitled to the benefits of the pension laws upon showing that he contracted disability as such officer, he can not be be relegated to the status of a civilian when his widow claims pension by reason of his death from the disability he was pensioned for.

The special act which conferred a status upon this officer that enabled him to claim pension as might any other officer who was recognized by the War Department as having been mustered, is very different from an act which simply provides a pension at a certain rate

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without reference to the military status of the beneficiary, and without leaving anything to be proved. In the latter case the benefit is individual and dies with the person. In the other the status is continuing and enters into every claim based upon the service and disability of the beneficiary. The declaration of Congress that a certain person shall be recognized as an officer or soldier is as high authority for so regarding him as though he were actually borne on the rolls and recognized by the War Department. And recognition in the one case does not cease with his death any more than in the other.

Upon the basis here indicated, then, this claimant has the right to have her claim adjudicated under the general law, and the action denying her the privilege was error and is reversed. The papers are herewith returned with directions that the claim be readjudicated and pension allowed from date of soldier's death, if his death was a result of the disabilities for which he was pensioned.

MARRIAGE—EVIDENCE—PRESUMPTIONS—COHABITATION AND REPUTE.

SARAH E. MANWELL (WIDOW).

Under the civil code of Oregon, as construed in the case of Murray *v.* Murray (6 Or., 26), "when it is shown by evidence that a man and woman are living together and cohabiting as man and wife, and are in the community reputed and received in society as such, it is sufficient prima facia to prove the marriage in a civil action or proceeding."

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 29, 1901.

On May 10, 1897, claims for pension under both the Revised Statutes and the act of June 27, 1890 (Claim No. 654489), were filed by Sarah E. Manwell as widow of Benjamin F. Manwell, who was a member of Company B, Fourth Iowa Infantry, from October 15, 1864, to May 31, 1865, and died May 26, 1881, without having applied for pension.

Said claims were rejected in January, 1899, the former on the ground that service origin of the soldier's fatal disease is not established, and the latter on the ground that the claimant had remarried prior to filing of claim; and on May 22, 1899, this appeal was filed, with the contention that the testimony of Comrades Williams and Reiterman fully establishes incurrence in service of the alleged fatal disease of lungs, and that the testimony of S. H. Murray, Samuel Donaldson, Edward Manwell, and Lillie J. Penwell shows claimant has not remarried.

In view of the claimant's stated present destitute circumstances, her appeal is taken up out of its regular order on the docket and given immediate consideration.

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As to the former claim, there is no medical or record evidence as to the cause of death, nor as to the existence in service of disease of lungs, the alleged cause of death, and no medical treatment for disease of lungs is shown to have been had at any time. The two comrades mentioned state merely that the soldier caught cold while in service, had a cough, and complained of his lungs. The testimony as to continuance is equally meager, weak, and inconclusive; and the evidence, on the whole, is clearly insufficient to establish that claim.

As to the latter claim, it appears that claimant some time after the soldier's death associated with one S. S. Penwell, who, on December 14, 1891, as guardian of a minor child of the soldier herein, filed a claim for pension on its behalf under the act of June 27, 1890, alleging therein that he married said widow on June 1, 1882. In a subsequent affidavit he stated there was no record of their marriage, and that he could not furnish the testimony of any eyewitness thereof; and he filed instead, on February 11, 1892, a joint affidavit by two citizens of Medford, Oreg., stating that during the six years of their acquaintance with said widow and Penwell, the latter had cohabited ostensibly and been generally and universally recognized as husband and wife, and that they, said witnesses, believed them to be such. On April 24, 1893, a joint affidavit by two others was filed, also stating that for eleven years past said widow and Penwell had so cohabited and been recognized as husband and wife.

This claim filed by said Penwell on behalf of said minor child is yet pending adjudication in the Pension Bureau.

The four witnesses referred to in the appeal, one of whom is a brother-in-law of the soldier's widow and another is her daughter, state merely that she has not remarried since the soldier's death, and make no specific reference to her relations with said Penwell. She states only that she was never married to him, but that she kept house for him. for a number of years, their two families living together. He is now dead, she says.

Under the statute and the decisions of the courts of the State of Oregon, where these parties resided, reputation and long cohabitation are considered sufficient to establish prima facie a marriage between parties so cohabiting.

The Oregon civil code of 1872, Title VII on evidence, paragraph 766, contains a list of "disputable presumptions," which are declared therein to be "satisfactory unless overcome;" section 30 of said list being "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage."

And the supreme court of Oregon in the case of Murray *v.* Murray (6 Or., 26), a suit to secure reissue to the complainant, as the lawful wife and widow, of a land patent alleged to have been fraudulently obtained by and issued to the defendant as such wife, held, citing the

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above section of the Oregon civil code and Bishop on Marriage and Divorce, pages 436, 438, and Reeve's Domestic Relations, page 401, that—

When it is shown by evidence that a man and woman are living together and cohabiting as man and wife and are in the community reputed and received in society as such, it is sufficient prima facie to prove the marriage in a civil action or proceeding.

The facts that said Penwell alleged a certain date of marriage, and that said widow made no mention whatever of any such marriage, and did not file any claim denying it until apparently after said Penwell's death, are significant. The evidence filed by the former in support of his allegation of a marriage, as well as that filed by said widow in denial of a marriage between them, is very meager and inconclusive.

It is therefore deemed advisable that this important question of the relations existing between said Penwell and said widow be thoroughly investigated, and that the claims be submitted for special examination upon that point, and to ascertain particularly whether there was a ceremonial marriage or not. The papers are returned accordingly, with directions for such special examination, and on their retransmittal with your report, upon conclusion of such readjudication, the appeal will be further considered.

ATTORNEYS—MATERIAL SERVICE—DECLARATIONS—INCREASE.

ALFRED CARPENTER (CLAIMANT).
MILO B. STEVENS & CO. (ATTORNEYS).

Where two declarations for straight increase are filed in behalf of a pensioner, they do not constitute the basis of different claims, unless a medical examination was held between the dates on which the declarations were filed, or unless the claim based on the first declaration is disposed of without holding a medical examination, and thereafter a second declaration is filed; with these exceptions declarations for increase filed subsequently to the first until a medical examination is held are but duplicates of the first declaration and the filing thereof is not material service.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 29, 1901.

Milo B. Stevens & Co., of Washington, D. C., on May 24, 1901, entered an appeal from the action of the Bureau denying them a fee on the issue of May 2, 1900, in the claim for increase of pension under the act of June 27, 1890, of Alfred Carpenter, who served in Company H, Third West Virginia Volunteer Cavalry.

The soldier was in receipt of pension under the act of June 27, 1890, at the rate of $8 per month, when in his behalf, July 7, 1897, Messrs. Taber & Whitman, of Washington, D. C., filed a declaration for increase of pension under said act.

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The appellants filed another declaration for increase of pension under the act of June 27, 1890, in behalf of the soldier, on October 23, 1897.

A medical examination ordered on March 30, 1898, through Messrs. Taber & Whitman, was held on April 20, 1898. Another medical examination (which was not ordered through an attorney) was held August 2, 1899.

Certificate issued May 2, 1900, to allow increase of pension at $12 per month from August 2, 1899, date of holding the last-mentioned medical examination. On said issue a fee of $2 was paid to appellants. They have refunded the fee, under protest, in favor of Messrs. Taber & Whitman; hence this appeal.

Appellants are denied a fee upon the ground, in substance, that they did not perform any material service in the claim. Appellants argue that there were pending two claims for increase, one of which was prosecuted by Taber & Whitman and the other by them; that the latter was allowed, and therefore they earned the fee. They contend that two claims for increase can be pending at the same time, and cite in support of this proposition the following cases: Robins E. Babcock (7 P. D., 285), Jacob C. Spires, dated April 21, 1898 (31 Fee P. L. Bk., 480).

Certainly the case of Robins E. Babcock, supra, is not in point. The case of Spires, supra, corresponds in all essential particulars with the case of Edward H. Teeter, decided June 12, 1895, cited in the case of William Boate (9 P. D., 275). Where two declarations for straight increase are filed in behalf of a pensioner they are not considered as the basis of different claims unless a medical examination is held between the dates on which the declarations were filed, or unless the claim based on the first declaration is disposed of without holding a medical examination, and thereafter a second declaration for increase is filed. With these exceptions declarations for increase filed subsequently to the first, until a medical examination is held, are but duplicates of the first declaration.

Where, in a claim for a straight increase, a declaration is filed and a medical examination has been held the claim is complete. Frequently more than one completed claim for straight increase are pending in behalf of a claimant at the same time, awaiting action by the Bureau. In such instances no conflict arises as to the rights of attorneys in the several claims, as a fee is certified in each case that is allowed to the respective attorney of record. Likewise there may be pending a claim for straight increase that is complete and one that is not, both in behalf of the same claimant. But in no instance can there be simultaneously pending in behalf of the same claimant two incomplete claims for straight increase. For, as has been shown, the several declarations filed prior to a medical examination constitute the basis of one claim only, with the exception noted. So while it is true that two claims

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for increase in behalf of a pensioner can be pending at the same time, there was only one claim pending in this case.

It appears that the claim was filed July 7, 1897, by Messrs. Taber & Whitman. Before any medical examination was held the appellants filed another declaration for increase. Under the decisions of this Department the second declaration is a duplicate of the first, and the filing thereof was not material service; in fact, appellants did not perform any material service in the claim.

Appellants also submit that the filing of a new declaration by them constituted the abandonment of the claim filed through Messrs. Taber & Whitman. The Department never has held that the filing of a new declaration for increase constituted the abandonment of a claim for increase based on a prior declaration. All decisions of this Department are in strict conformity with the rule approved in this case, that the filing of a new declaration in an incomplete claim for increase is but a duplicate of the original declaration in such incomplete claim, and that the filing of such duplicate declaration is not material service and can not entitle an attorney to a fee.

The action of the Bureau in denying the appellants a fee is affirmed upon the ground assigned.

COMMENCEMENT—ACT JUNE 27, 1890—MINOR'S PENSION.

MINORS OF SIMEON W. DARE.

1. The construction of the act of June 27, 1890, under which a minor's pension is made to commence from the date of filing the application therefor, in a case in which there was a prior widow pensioner who has died or remarried, is adhered to.
2. The application, filed in October, 1895, which was rejected as an application under the general law, is held to have been an application under the act of June 27, 1890, and the date of filing said application is the correct date of commencement of the minor's pension.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 29, 1901.

Adolphus D. Puckett, as guardian of William G. and Clydia Dare, minor children of Simeon W. Dare, formerly a sergeant in Company F, Fifty-sixth Illinois Infantry, filed, on January 20, 1897, an application for pension under the act of June 27, 1890, which was allowed in January, 1898, the pension being made to commence from the date of filing said application. A prior application, filed on October 31, 1895, by Mary A. Allen, as guardian of the minors, was treated by your Bureau as an application under the old or "general law," and rejected on the ground that the soldier's death was not a result of his military service. An appeal was filed April 12, 1898, in which it is contended that the application filed on October 31, 1895, was intended as an application under the act of June 27, 1890, and that pension should have been allowed from the date of filing said application, if

not from the date of remarriage of the mother, who was the former guardian."

The secondary contention, or suggestion (for no argument is advanced in support of it), that the pension might have been allowed to commence from the date of the remarriage of the mother and former guardian of the minors requires brief notice.

The mother was pensioned under the act of June 27, 1890, at the rate of $8 per month, commencing from July 3, 1890, with $2 per month additional for each of four minor children. She remarried on November 15, 1891, and her pension then terminated. One of the minors attained the age of 16 years prior to the mother's remarriage; another became 16 on July 13, 1894; application was made on behalf of the other two by the mother, as guardian, on October 31, 1895, as heretofore stated.

The question as to the date at which the minors' pension in such a case should begin has been the subject of frequent and careful consideration by the Department. It was held by Assistant Secretary Bussey, in an opinion delivered September 12, 1892, that in case of the death or remarriage of a widow pensioner under the act of June 27, 1890, the minors' pension would begin from the date of the widow's death or remarriage, and this "by operation of law, whether at that date a formal application be made therefor or not," but that in case the soldier died leaving no widow, but leaving a child or children under 16 years of age, the pension to such child or children could only commence from the date of filing the application therefor. (A. P. Alexander, 6 P. D., 40.) A contrary view was taken by Assistant Secretary Reynolds, who held that all pensions under the act of June 27, 1890, must commence from the date of filing application therefor, after the passage of the act, and in the case of minors after the death or remarriage of the widow. (Timothy L. Carley, 7 P. D., 12; minor of Ernst Rieckoff, 8 P. D., 324; Mary E. Bronoel, 8 P. D., 387; minor of George W. Good, 8 P. D., 407.)

The latter view has since prevailed, and was reaffirmed by Assistant Secretary Davis in the case of the minors of David S. Sharer (9 P. D., 189), in language as follows:

> It can not be denied that the law is somewhat ambiguous. It nowhere, in express terms, makes provision for a minor's pension as such. It prescribes the conditions upon which a widow may receive pension, and then declares that in case of the death or remarriage of the widow "such pension" shall be paid to the soldier's child or children under the age of 16 years.
>
> It might be argued, from the language, that the intent was not to make a separate grant of pension to the minor or minors, but to simply continue the pension which had formerly been paid to the widow and pay the same to the minor child or children until the age of 16.
>
> The more reasonable view, it appears to me, is to hold that the intent was (as in the old law) to make provision for two distinct classes of pensions, viz, widows' pensions and minors' pensions. The Department, in fact, adopted this view when it

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held that said section authorized the allowance of pension to minors in cases in which the soldier left no widow.

As the act does not grant pension to minors in express terms, but only by implication, it makes no express provision for the commencement of such pension; but inasmuch as all other classes of pensions provided for by said act are made to commence from "the date of application therefor, after the passage of the act," and there is nowhere manifest an intent to establish a different date of commencement for minors' pensions, I am of the opinion that the same rule was intended to apply to them. This has been the rule in cases where no widow survived the soldier, and I can see no good reason why it should not also be the rule in cases where there was a widow. The minors are required to make an application in the latter class of cases as well as in the former. Their application is not for a continuance of the widow's pension, but for an original grant to them of a minor's pension; and in support of such application they must furnish proof that the widow's title is extinct.

For these reasons I am unable to concur in your opinion as to the date at which the minor's pension in this case should have begun, but hold that, in that respect, the adjudication was correct.

It thus appears that the construction of the act of June 27, 1890, whereby minors' pensions thereunder are made to commence, in all cases, from the date of filing application therefor, has now obtained uninterruptedly for nearly seven years. As to the effect of such action, Sutherland on Statutory Construction (sec. 309) says:

> The practical construction given to a doubtful statute by the public officers of the State, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt. This is similar in effect to a course of judicial decisions. The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. Contemporary construction, and official usage for a long period by the persons charged with the administration of the law, are among the legitimate aids in the interpretation of statutes.

The fact that Congress has recently had the act of June 27, 1890, under consideration with a view to amending it in those particulars in which its administration had been found to work hardship or injustice, and that no amendment was made to that part relating to minors' pensions, is not without significance in this connection. The appellant has advanced no reason why an interpretation of a doubtful statute which has prevailed so long, under which so many cases have been adjudicated, and which has received the tacit assent of the law-making power, should be disturbed.

Recurring to the main contention of the appeal, that the pension should have been allowed to commence from the date of filing a former application, I find that the application referred to was in the following language:

DECLARATION FOR PENSION OR FOR INCREASE OF PENSION OF CHILDREN UNDER SIXTEEN YEARS OF AGE.

STATE OF ILLINOIS, *County of Jefferson*, ss:

On this 14th day of December, A. D. 1891, personally appeared before me, a notary public of the city of Mount Vernon, within and for the county and State aforesaid,

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Mrs. Mary A. Allen, guardian of Lawrence D., William G., and Clydia Dare—minors of Simeon W. Dare, deceased—a resident of McClelland Town, county of Jefferson, State of Illinois, aged 8, 10, and 13 years, respectively, who, being duly sworn according to law, makes the following declaration in order to obtain the pension provided by act of Congress for children under 16 years of age: That they are the legitimate children of Simeon W. Dare, deceased, who enlisted under the name of Simeon W. Dare at Macedonia, Ill., on the 15th day of November, A. D. 1861, in Company E of the Fifty-sixth Regiment Illinois Infantry Volunteers, in the war of 1861–1865, who died of complication of diseases—kidney and stomach chiefly—at Jefferson County, Ill., on the 29th day of May, A. D. 1885, and who bore at the time of his death the rank of sergeant, out of service; that he left a widow surviving, Mary A. Dare, who, on November 15, 1891, remarried to one Charles R. Allen, at Jefferson County, Ill.; that the above-named are the only surviving legitimate children of Simeon W. Dare who were under 16 years of age at the time of the remarriage of the widow, who drew pension to date of remarriage; that said children were the issue of soldier, as follows, the dates of their birth being as hereinafter stated:

Lawrence D., of soldier, by Mary A., born July 14, 1878.

William G., of soldier, by Mary A., born April 10, 1881.

Clydia, of soldier, by Mary A., born November 20, 1883.

That the mother was married under the name of Mary A. Carroll to Simeon W. Dare, there being no legal barrier to such marriage; that the said children have not aided or abetted the rebellion; and that a prior application has been filed by herself (now applying as guardian) on which she was pensioned, certificate No. 279,505; that declarant hereby appoints, with full power of substitution and revocation, James M. Pace, of Mount Vernon, Ill., her attorney to prosecute the above claim; that her post-office address is Mount Vernon, Ill. She requests application of testimony filed in her claim, No. 329,172, on which said certificate No. 279,509 was issued to her as widow, in this case.

MARY A. ALLEN, *Guardian.*

C. R. ALLEN.

J. A. CARROLL.

One of the prerequisites in a declaration for pension under the general law is an allegation that soldier died by reason of his military service. Attention is directed to the fact that this declaration makes no allegation to that effect, either directly or inferentially, and that, further, the declaration refers in express terms to a pension already granted to the said guardian, as the widow of the soldier, said pension being granted under the act of June 27, 1890. And still further, the said application requests, also in express terms, that testimony filed under the application under which she was granted said pension (act of June 27, 1890) should be considered in the said guardian's claim. The absence of an averment as to service origin of death cause, and the references to the pension granted the widow under the act of June 27, 1890, would appear to be amply sufficient to have warranted an adjudication of the claim filed by the guardian as under the act of June 27, 1890. Looking at it, however, in the most unfavorable light, as far as the minors are concerned, the application is couched in such terms as would certainly raise a strong doubt as to whether it was intended as a declaration under the general law; such being true it became the unquestioned duty of those charged with the adjudication of the claim

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to satisfy themselves as to the true intent of the guardian in the premises.

Again, as being somewhat indicative of the intent of the declaration in question, it may be remarked that this guardian did, as widow of said soldier, file a claim under the general law on July 24, 1885, said claim being rejected on April 10, 1886, on the ground that the death of the soldier was not shown to have been due to his military service. In a case similar to the one under consideration I held it to be—

* * * more reasonable to assume, in the event that the declaration was questionable as to what law it claimed under, that it was intended to claim under the law under which a favorable adjudication has already been had, rather than to claim under a law under which a claim, involving the same issues, had been rejected. (W. S. McDonald, as guardian of minors of William A. McCoy, Docket No. 43045.)

I believe such a proposition to be sound, and in the within case there is, as seen, much reason to believe, from the express terms of the declaration, that it was intended to be one under the act of June 27, 1890. I again hold, by reason of the premises herein, the same as I did in the McDonald case, supra, that—

* * * in the event of the nature of the declaration in question being obscure or ambiguous, the intent of the declaration should be settled before adjudication.

It appears by reason of the foregoing that the first contention of the appeal is well taken, and the adjudication of the claim in question, by treating the application thereunder as one under the general law, is revoked and set aside, and you will reopen the case and adjudicate it upon the holding that the application filed on October 31, 1895, by Mary A. Allen, as guardian, was an application under the act of June 27, 1890.

—

SERVICE—ACT JUNE 27, 1890—ABSENCE.

JOHN R. TROUT.

As the claimant was with his command only a week or two and then went home and remained there until the company was about to be mustered out, his place in the ranks being, in the meantime, taken by another man who answered to his name at roll call, it not being shown that he received a sick furlough as alleged, he did not serve ninety days within the meaning of the act of June 27, 1890, and was not entitled to pension thereunder.

Assistant Secretary F. L. Campbell to the Commisioner of Pensions, June 29, 1901.

The appellant, John R. Trout, sometime a soldier in Company K, Fifty-fifth Indiana Infantry, was, in May, 1891, granted a pension of $12 per month under the act of June 27, 1890. In November, 1898, after a special examination, his name was dropped from the pension

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roll on the ground that he did not render ninety days' actual military service. From that action he appealed January 31, 1899.

The records of the War Department merely show that John R. Trout, of Company K, Fifty-fifth Indiana Infantry, was enrolled July 25, 1862, and mustered out October 28, 1862, and that during the period intervening between those dates he was reported present on all rolls.

From evidence procured by special examination in June, 1898, it appears that about a week or two after his enlistment the appellant left his company and went home and that he remained there until the company was about to be mustered out, his place in the ranks, in the meantime, being taken by one Edwin Ferguson, who answered to his name at roll call and served in his stead.

As to these facts there is no dispute, but the evidence discloses some discrepancies as to the circumstances under which the substitution was made. The claimant says he was sent home on sick furlough, and that he was not a party to any arrangement whereby another man was permitted to serve in his place He admits, however, that he understood that one Edwin Ferguson answered to his name at roll call and drew a part of his pay. Ferguson says:

About one week after Company K went to Indianapolis I went to Indianapolis. * * * When I reached the depot at Indianapolis I met John R. Trout, a nephew of mine, who had enlisted in Company K. Said Trout was sick. I told him to go to see Captain Layman and if he was willing I would take his (Trout's) place. He saw the captain and started home the same day. I went to camp and served, as I understood it, in Trout's place. In a few days after I joined the company I went with the company to Kentucky. No; Trout did not go. We were down there about four weeks, then back to Indianapolis a week or so. The company then went to Jeffersonville, Ind., to guard bridges. I did not go; stayed about Indianapolis and went home to Cloverdale one week. I went back to Indianapolis and was there when the company was mustered out. I went there and the captain told me to answer to Trout's name. The officer (name unknown) said to wait a few days till those who were home sick came and all would be mustered out at once. Trout was sent for and he came and was mustered out. I was near by at the time. The captain had the pay. He gave me part of it and he gave Trout some.

Captain Layman, referred to in the above statement, testified that he remembered John R. Trout, but had no recollection of his being sick or disabled in any way while in camp at Indianapolis, or of his going home and his place being taken by another man. Hearing the sworn statement of Edwin Ferguson did not refresh his memory as to the alleged facts.

The appellant's attorney has submitted an argument in support of the appeal in which he presents a number of hypothetical cases to show that the service contemplated by the act of June 27, 1890, is not necessarily active service in field or in camp, but that it includes time spent in hospital and at home on sick furlough. There will be no dissent from this as a general proposition, but it does not fit the facts

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in this case. The appellant was not in hospital and there is no evidence that he received a sick furlough. Sick furloughs were limited as to time and if a soldier was not able to report at the expiration of his furlough it was necessary for him to have it extended by proper authority or be considered as absent without leave. It is not contended that this soldier received any extension of furlough after leaving the company, although he was at home, according to his own statement, about eighty-two days out of the ninety-six that elapsed between his enlistment and his discharge.

Again, a soldier on sick furlough was not required to furnish a substitute, and did not lose his pay for the time he was absent; so that the very fact that the appellant did have a substitute who, as he says, received a part of his pay, tends strongly to show that he was not furloughed on account of sickness, but that he went home, either without the knowledge of his officers or pursuant to some such arrangement as that suggested by the testimony of Ferguson—an arrangement which was clearly irregular and unwarranted by military regulations.

It is believed that the act of June 27, 1890, contemplates an actual service of at least ninety days in the sense that the soldier or sailor beneficiary must have been for that length of time either performing military duty, or in hospital, or on sick furlough, or held as a prisoner by the enemy. The language of the act is: "All persons who served ninety days or more," etc. It would seem to be unnecessary to argue that a man voluntarily absent from his command without leave, or with leave for purposes of his own business or pleasure, was not serving his country during the time of such absence.

Upon the facts shown in evidence in this case, the appellant has no title to pension and his name is properly dropped from the roll. The action is affirmed.

EVIDENCE—WEIGHT OF EVIDENCE—PRESUMPTION OF PRIOR SERVICE.

JOHANNA DORGAN (WIDOW).

The rejection of the claim on the ground of claimant's inability to prove that the soldier was not in the military or naval service of the United States prior or subsequent to the term of service on which said claim is based, when the weight of the evidence and reasonable inference from known facts are against the probability that the soldier was in the service at any other time than as stated, was error, as the claimant should be given the benefit of any remaining doubt on that point.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 10, 1901.

Johanna Dorgan filed on July 30, 1892, a claim for pension under the act of June 27, 1890, as the widow of Peter Dorgan, who served from November 27, 1861, to September 7, 1863, as a private in Company B,

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Seventy-eighth New York Infantry. Her claim was rejected by the Pension Bureau in January, 1901, upon the ground that she was not shown to be the lawful widow of the soldier, Peter Dorgan, and upon the additional ground that said soldier was not shown to be dead. An appeal was taken, and, on March 11, 1901, the Department reversed the action as to both of the grounds stated, and directed that the claim be readjudicated. On June 10, 1901, it was readjudicated and again rejected -

* * * On the ground that there is no satisfactory evidence in the case that the soldier was not in the naval or military service of the United States Government during the war of the rebellion prior to November 27, 1861, or subsequent to September 7, 1863, and the claimant has declared her inability to furnish same.

From that action an appeal was taken June 19, 1901, the contention being that the ground assigned is insufficient to warrant the rejection of the claim.

The claimant has given good and sufficient reasons why she can not furnish positive evidence that the soldier was not in the military or naval service of the United States otherwise than as stated. She was not married to him until 1873; the marriage occurred in Ireland; she did not come to this country until 1880; consequently she does not know of any persons who knew him during his residence here prior to November, 1861, or between September 7, 1863, and the date of his return to Ireland. She declares that, to the best of her knowledge, his only enlistment was in Company B, Seventy-eighth New York Infantry, and submits, as the best obtainable evidence on that point, the affidavit of the soldier's son (by a prior marriage), who swears that his father enlisted but once, and was not in the military or naval service prior to November, 1861, or subsequent to September, 1863. This affiant was about five years old in 1861, and about nine when the war closed.

The soldier filed two declarations for pension on account of disability incurred while serving in Company B, Seventy-eighth New York Infantry—one on September 18, 1863, and the other on November 5, 1875—but in neither of them did he make any statement as to prior or subsequent service. There appear to be no reasons for supposing that he was in the service prior or subsequent to the dates named, except those stated by a reviewer, in a slip attached to the "brief," as follows:

Soldier was discharged September 7, 1863; applied for pension Septemper 18, 1863; was examined May 23, 1864; and had a record for alleged disability. The claim was established, and yet he failed to further prosecute, and never drew pension. There were still opportunities for enlistment, and high bounties were then prevalent and a great incentive. In fact all the circumstances point to the probability of reenlistment one or more times. In fact, he may have been a successful bounty jumper. At least, soon after, he was able to make a trip to Ireland, and had some money for which, it is evident, claimant married him.

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The soldier did not make the trip to Ireland until 1871 or 1872. (See the testimony of his son.) It requires considerable ingenuity to find, in the fact that he had "some money" at that time, confirmation of the theory that he reenlisted one or more times for bounty between September, 1863, and the close of the war.

His claim for pension was not allowed in 1864, and does not appear to have been "established" under the rules then prevailing in the Pension Bureau. (See indorsements on the old "jacket," as to calls for evidence in November, 1863, and April, 1872.) It will hardly be maintained that his failure to continue the prosecution of the claim can not be reasonably accounted for otherwise than by assuming that he reenlisted. If it can be reasonably accounted for otherwise, how does it "point to the probability of reenlistment?"

It seems to the Department that the facts, fairly considered, rather tend to render it improbable that the soldier reenlisted. He was discharged from service in September, 1863, as being "incapable of performing the duties of a soldier because of cataract of both eyes," and "unfit for the Invalid Corps." He was examined in May, 1864, and reported to be suffering from chronic conjunctivitis with granular lids, his eyes being very weak and exposure to light causing great pain. The disability was thought by the examining surgeon to be "temporary," but the records of the Soldiers' Home at Hampton, Va., show that he was still suffering from chronic conjunctivitis, with eversion of the lids and impaired vision, when admitted to that institution in December, 1874. If his condition was correctly described by the examining surgeon in May, 1864, it is manifest that he would not have been accepted if he had offered to enlist at that time; and in view of the record showing that he was suffering from disability of the same character in 1874, it does not seem probable that he was fit for military duty at any time after his discharge in September, 1863. At any rate, there is a total absence of facts that would warrant an assumption that he was a good subject for reenlistment between September, 1863, and the close of the war.

But assuming that he was in the service during the war, either prior to November 27, 1861, or subsequent to September 7, 1863, that fact would cut no figure in the widow's claim under the act of June 27, 1890, unless it be also assumed that he deserted or was dishonorably discharged from such service; so that her claim stands rejected upon a possibility based upon a possibility—a possibility that the soldier deserted or was dishonorably discharged from a service which is itself a mere possibility. Such a rejection plainly violates the rule so often announced by the Department, that claimants should be given the benefit of slight doubts, and that where the proofs or probabilities for and against any element of title are balanced, the presumption should incline in favor of the claim. (Digest of Pension and Bounty-Land

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Decisions, p. 204.) This is a rule of general application, and not one to be applied or not applied as a reviewer may see fit. In the case under consideration it is believed, for reasons heretofore stated, that the weight of the evidence and reasonable inference from known facts are against the probability that the soldier was in the military or naval service of the United States at any other time than that stated in his and in the widow's applications for pension, and that the claimant should have the benefit of any remaining doubt on that point. The action appealed from is reversed and the case herewith returned for readjudication.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—DISCHARGE—ACT JUNE 27, 1890.

MATILDA C. TUNISON (WIDOW).

The deceased officer was formerly a pensioner at total of rank as major ($25 per month) on account of "fracture of right elbow." His death on February 23, 1898, according to the return thereof made by the attending physician, was due to "Amyotrophic lateral sclerosis and acute pneumonitis."

Pneumonitis (pneumonia) being an acute disease—due to a specific germ—could not have been a result of his military service; and his medical attendant's testimony to the effect that the amyotrophic lateral sclerosis was a pathologic sequence of the fracture of right elbow, not being in harmony with the holding of recognized medical authorities, to the effect that the etiology of such disease is as yet unknown, the arbitrary and unsupported professional opinion or theory of this affiant can not be permitted to control the judgment of the Department in this case, which is: That the appellant has no title to a pension under the general law, as the case now stands.

The decedent's discharge from Company G, Twentieth Illinois Infantry, according to the decision of the War Department, which has sole jurisdiction in such matters, not having been an honorable discharge, his relict, the appellant, has no title to a pension under the provisions of section 3, act of June 27, 1890.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 10, 1901.

Matilda C., widow of John Tunison, late captain, Company G, Twentieth Illinois Infantry, and major One hundred and fifty-sixth and One hundred and thirty-eighth Illinois Infantry, respectively, filed January 29, 1901, through her attorneys, an appeal from the rejection by the Bureau of her claims for pension under the general law and under the act of June 27, 1890, as well.

The late officer, the husband of the appellant, who enlisted April 24, 1861, and was discharged November 16, 1862, reenlisted June 29, 1864, and was discharged October 14, 1864, and was again mustered in March 9, 1865, and then finally discharged September 20, 1865, was a pensioner under the general law at "total of rank," as major ($25 per month), on account of "fracture of right elbow." He died February 28, 1898, and on August 2, 1898, his widow filed her said claims for pension under both the general law and the act of June 27, 1890. The former claim was rejected September 27, 1899, on the ground that the

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soldier's death from disease of lungs and spinal cord was not due to the fracture of right elbow for which he was pensioned, and the latter claim was rejected September 19, 1899, on the ground that the soldier had "not been honorably discharged from all service," as required by the terms of the act of June 27, 1890.

It is contended in the pending appeal in the premises that—

* * * It is shown by the evidence that the injury to arm caused a nervous disease, which progressed and finally involved the spinal cord, and thereby resulted in death. It is believed that the opinion of the attending physician, supported by the facts stated in his affidavit, should govern in the adjudication of the claim.

And departmental decision of December 5, 1900 (11 P. D., 151), in the case of Enoch Alexander, is cited as involving a similar question.

Relative to the rejection of the claim under the act of June 27, 1890, it is contended that the "disability" which caused the soldier's dismissal from the service in 1862, while captain of Company G, Twentieth Illinois Infantry, having been "removed in 1865," that "the removal of the disability would apparently make the service honorable."

Inasmuch as the report which the Bureau was requested to make—in the light of the foregoing contentions—consisted only of an advisory opinion of the medical referee as to the propriety of the medical action in the claim under the general law, the validity of the rejection of the claim under the act of June 27, 1890, upon the ground assigned for the adverse action in such claim was not considered in the said report, which is as follows:

This deceased officer was pensioned for a fracture of the right elbow. The evidence shows that he had painful neuromata on the right arm in the vicinity of the seat of injury, and that at different times surgical operations were performed for their removal. He died February 23, 1898, the causes of death being stated in the official return made at the time by the attending physician as "acute pneumonitis" of five days' duration and "amyotrophic lateral sclerosis" of five years' duration. In his affidavit, made more than six months later, this physician stated that the immediate cause of death was "amyotrophic lateral sclerosis, produced by the injury of arm and spine," and made no reference to the acute pneumonitis. No injury to the spine had ever been alleged or shown, however, and there is no warrant for the further contention in the appeal "that the injury to arm caused a nervous disease which progressed and finally involved the spinal cord and thereby resulted in death." There was no probable pathological relation between the injury of the right elbow, which was incurred in 1864, or any other probable injury at the same time, and the disease of the spinal cord and acute pneumonia, which proved fatal in 1898. As indicated by the official report of the death, as well as by the physician's subsequent affidavit, the duration of the primary fatal disease was five years, a period that is rather longer than the average in that affection, the prognosis of which is invariably bad. No definite exciting cause or causes of amyotrophic lateral sclerosis are recognized, but Dana, a recent (1897) writer and authority, says it is "considered a disease of involution, i. e., teratological defect, the first and second motor neurons degenerating because of inherently deficient vitality." The rejection of the claim on the ground stated is adhered to.

As stated in the foregoing report, "no definite exciting cause or causes of amyotrophic lateral sclerosis are recognized" in the science

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of medicine. Such disease is, however, held by recognized medical authorities to be "clinically and pathologically well defined," in so far as it appears to be "a combination" of two other well-defined diseases of the spinal cord, namely, "lateral sclerosis and chronic spinal muscular atrophy" (Peterson). A number of causes of each of these two diseases have been mentioned by various writers, but the etiological factors upon which they as well as a number of other chronic diseases of the spinal cord depend yet remain to be demonstrated to the absolute satisfaction of the medical profession. In view of the obscurity of the origin of the majority of this class of cases it is not strange that the observer herein quoted (Peterson) should state:

> We do not know what factors are at work in the production of amyotrophic lateral sclerosis. Doubtless when we understand better the etiology of other chronic systemic diseases or degenerations of the spinal cord, the causes of this disorder will be clear.

Therefore, in view of the fact that some of the best-known and most highly respected observers, both past and present, have frankly acknowledged their inability to arrive at any satisfactory solution—after the most careful and thorough research—of such problems as the one under consideration, it must be held that the contention of the attorneys for the appellant "that the opinion of the attending physician, supported by the facts stated in his affidavit, should govern in the adjudication of the claim" is wholly untenable.

The said physician testified that the immediate cause of the soldier's death "was amyotrophic lateral sclerosis produced by the injury of arm and spine." In view, however, of the facts hereinbefore set forth, the Department must decline to concur in such statement, and holds it to be entirely insufficient to determine a question of so much importance as the one herein considered. But, at the same time, no reflections upon the ability and probity of the said affiant are intended by such holding, neither is it intended to assert as a fact that his theory in this instance is incorrect, as the Department does not undertake to determine questions of this character from an etiological, but from a judicial, standpoint; and its judgment is based upon the ascertained results of the researches and investigations of the ablest observers in this particular field known to the medical profession throughout the world, whose findings have been universally adopted by such profession, and which accepted findings must control until the patience and toil of some one or more of these observers shall be rewarded by the discovery of the hidden foe for which they have so long searched, and it can be confidently announced and demonstrated to the world that the true nature of the cause or causes of these obscure diseases is no longer a mystery, as was so successfully accomplished in the study of the nature and origin of a large number of the specific infectious diseases—notably so in tuberculosis, diphtheria, and cholera, and partially so in typhoid, malarial, and other fevers.

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Furthermore, the arbitrary and unsupported professional opinion or theory advanced by the attending physician of a soldier is not sufficient to control the judgment of the Department in any case. (See case of Margaret Lalone, widow, 11 P. D., 301.)

The case of Enoch Alexander (11 P. D., 151), cited by the attorneys as being similar to the case at bar, is not an analogous case. The pathology of the case cited was definitely determined, and the holding of the Department in the premises was sustained by competent medical authority, whereas in the case at bar the same authority is adverse to the contentions herein set up.

Eliminating, then, from further consideration the question of the probable origin of the aforesaid disease of spine, there is still another factor, and a very potent one, too, to be considered in connection with the death cause of the soldier, namely, "acute pneumonitis of five days' duration." And inasmuch as the said acute attack of pneumonia can hardly be claimed to have been a result of the fracture of right elbow for which the soldier was pensioned, or to have been otherwise due to his military service, it must be held that the widow's alleged title to a pension under the general law has not been established. The rejection of such claim is, therefore, hereby affirmed.

Relative to the contention in regard to the rejection of the widow's claim under the act of June 27, 1890, it need only be said that inasmuch as the War Department, which has sole jurisdiction in such matters, has decided that the soldier's discharge from the Twentieth Illinois Infantry, November 16, 1862, "for willful neglect of duty and violation of orders is not regarded as an honorable discharge," such contention is wholly untenable.

The rejection of the appellant's claim under the said act is therefore hereby affirmed.

MARRIAGE—COLORED PERSONS—EMANCIPATION PROCLAMATION.

ROSE E., ALLEGED WIDOW OF ISRAEL SMITH.

Appellant, prior to the time of her alleged marriage to soldier, married one William Norris, in 1864, who was at the time a soldier in the United States Army, stationed at Portsmouth, Va., in territory in possession of the United States forces in which the President's emancipation proclamation of January 1, 1863, was effective, and claimant was also in said territory serving with the United States forces as laundress, the ceremony of marriage being performed by the chaplain of soldier's regiment. As it is shown that said Norris was still living at the time of claimant's alleged marriage to Smith, and no divorce being shown, said marriage was void.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 10, 1901.

On January 22, 1901, the Department affirmed the rejection of the claim of Rose E. Smith, alleged widow of Israel Smith, formerly of

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Company E, Thirty-eighth United States Colored Volunteer Infantry. Said claim was filed on August 7, 1897, under the act of June 27, 1890, and was rejected on August 7, 1899, on the ground that the claimant was not shown to be the lawful widow of the soldier. The claimant, on February 21, 1901, filed a motion for reconsideration of the above mentioned action of the Department, resting upon the contention therein set forth as follows:

I contend that the only material question unsettled in this case is whether the supposed marriage of claimant to one Norris in 1864, at Norfolk, Va., was void or valid. In determining that question it must be borne in mind that the parties were refugee slaves, and within the meaning of the law they were as incompetent to enter into a contract of marriage at that time as were cattle or any other stock. The fact that they had run away from their masters did not make them free persons within the meaning of the law.

It is stated in your decision that claimant and Norris were "joined in marriage by some ceremony deemed by them obligatory as specified in section 4705, Revised Statutes. But I can't believe, if that be so, that you hold that such ceremony constituted a valid marriage in Virginia under an act of Congress, as Congress had no jurisdiction of the question of marriage in the State, it being governed wholly by State laws and statutes. (See Bishop on Marriage and Divorce, vol. 1, pp. 88, 155–163.)

Section 4705 does not declare what shall or shall not be a valid marriage, but simply provides in what cases widows shall be entitled to receive the pension provided by law without other evidence of marriage than satisfactory proof that the parties were joined in marriage by some ceremony deemed by them obligatory, or habitually recognized each other as man and wife and were so recognized by their neighbors, and lived together as such up to the date of enlistment, when such soldier or sailor died in the service, or, if otherwise, to date of death. It nowhere declares that such section should be used against the claimant, and this is the first instance I have ever known it to be so construed. It was clearly the intention of Congress to provide a means whereby the widows and children could obtain a pension in cases where no valid marriage existed, and Congress has never, so far as I know, attempted to legislate on a question of marriage within the domain of a State. If it had done so, it would clearly be unconstitutional and of no effect, having no jurisdiction on the subject.

I contend, without fear of successful contradiction, that said marriage was not valid when contracted, and never has been since, and it seems to me that it is such a clear case that there is no necessity of quoting from the numerous decisions and authorities that could be arrayed to sustain this view.

In the decision under review it is held as follows:

It is contended in brief that claimant's first marriage in June, 1864, at Portsmouth, Va., to William Norris was void under the code of Virginia, 1873, page 84, and that therefore her second marriage October 29, 1870, to Israel Smith, in the same State, was valid, and that it is immaterial whether Norris was alive when claimant married Smith.

It appears that claimant was first married to William Norris, then a private in Company K, Thirty-sixth United States Colored Volunteer Infantry, at Portsmouth, Va., by the chaplain of his regiment, in the summer of 1864; that she lived with Norris but a few days as his wife when his regiment was ordered away and she has never since seen him. The records show that Norris was discharged September,

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1866, and is shown by the testimony of Miles Brown to have been alive as late as 1893 or 1894.

On October 29, 1870, claimant married Israel Smith, late private, Company E, Thirty-eighth United States Colored Volunteer Infantry, at Norfolk, Va.

In said opinion it is further held:

The only question raised by the appeal is the validity or invalidity of the first marriage, and it is contended that it is invalid because of the laws of Virginia, above cited.

That claimant and the soldier Norris "were joined in marriage by some ceremony deemed by them obligatory," as specified in section 4705, Revised Statutes, is evidenced on the part of the claimant, at least, by the fact that she applied for pension as his widow on May 17, and July 17, 1890, relying on the validity of said first marriage, and her said claim was rejected August 7, 1899, not upon the ground that said marriage was illegal, but upon the ground that she was unable to establish the death of her first husband.

There is nothing on page 84 of the Code of Virginia of 1873, cited by claimant's attorney, which has any bearing on the subject of marriage, and it is possible that a reference to page 844 of said code was intended.

Section 7 of chapter 105 of said code, relating to marriages, etc., pages 843 and 844, provides as follows:

"Every marriage in this State shall be under license and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons so married, or either of them, that they have been lawfully joined in marriage."

Section 13 of said act, page 844, provides as follows:

Where colored persons before the passage of the act shall have undertaken and agreed to occupy the relation to each other of husband and wife, and shall be cohabiting together as such at the time of its passage, whether the rites of marriage shall have been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges and subject to the duties and obligations of that relation in like manner as if they had been duly married by law, etc.

There is nothing in the law of Virginia, nor in the facts in the case, which would justify the conclusion that claimant's first marriage to Norris was illegal or invalid.

It will thus be seen that the motion for reconsideration raises the question of the legality of claimant's marriage to Norris in 1864. The statute of Virginia, copied in the decision under review, was passed on February 27, 1866, and, from its own terms, can have no application to the case at bar unless the parties were "cohabiting together as such at the time of its passage," and such cohabitation must, of course, have been in the State of Virginia to have been affected by the statute. But the claimant and Norris were not cohabiting together in Virginia or anywhere else on February 27, 1866. The soldier was away with his regiment, it appears, in the State of Texas, and had not seen the claimant since the summer of 1864, nor did he ever see her again.

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Bouvier defines the word "cohabit" to mean: "To live together in the same house, claiming to be married."

Bishop on Marriage and Divorce, vol. 1, section 1669, defines "cohabitation" as follows:

To cohabit is to dwell together. So that matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife.

There is no evidence in the case which indicates that the soldier would have cohabited with the claimant in 1866, even if it had been in his power to do so. It does not appear that he communicated with her at any time during the period of his military service, or that he ever made the slightest effort to join her subsequent to his discharge in September, 1866. It is manifest that the act of February 27, 1866, has no legal bearing on the pensionable status of the claimant growing out of her marital relations to the soldier Norris.

It is next in order to consider the case at bar in the light of the provisions of section 4705, Revised Statutes. The application of that law in the case of Lucinda Harris (11 P. D., 181) is in point. The syllabus in that case, which correctly states the material question, is in the following words:

A claimant who relies upon the rule of evidence provided in section 4705, Revised Statutes, must show either that she lived with the soldier up to date of enlistment, when the latter died in the service, or, if otherwise, that she lived with him up to date of death.

Neither of those conditions being present in her case, her claim was held to have been properly rejected. For a similar reason, the provisions of said section have no application in determining the pensionable status of this claimant growing out of her marriage to Norris in 1864.

But there is another material aspect of the case not dealt with either in the opinion under review or in the motion for reconsideration. Were the claimant and William Norris, at the time of their marriage in 1864, slaves or freemen? If they were freemen they undoubtedly had the legal right to enter the marital relation. It will be remembered that William Norris was a soldier whose regiment was stationed temporarily at Portsmouth, Va., and it appears also from the evidence that the claimant was at the same place within the military lines of the Union Army doing laundry work for the soldiers. The emancipation proclamation was in active force and operation, and it has been held by various courts, including the Supreme Court of the United States, that "wherever the national forces obtained control the slaves became freemen." This doctrine was recognized by the Department in the case of Harriet Tinnin (8 P. D., 218). The principle decided is stated in the second paragraph of the syllabus as follows:

The proclamation of President Lincoln of January 1, 1863, known as the emancipation proclamation, was effective only as a war measure, and did not ipso facto, and

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by the mere force of its own terms, set free or change the legal status of persons held in slavery in the States or parts of States therein designated, but operated to give freedom to such persons only when it was enforced by the armed forces of the United States, and by the subjugation of the territory where they resided and its subjection to the military power and authority of the Federal Government.

In section 1923 of vol. 2, Story on the Constitution, the doctrine is announced as follows:

The dealings of the Government with slavery, and the influence of that institution upon military plans and movements, constitute a chapter of high importance and interest in the history of the great civil war, but an account of them would be out of place here. Before the war ended most men came to acknowledge, what a few had perceived from the beginning, that the same blows which destroyed the rebellion must inflict mortal wounds upon slavery; and, indeed, the proclamation of emancipation which the President had put forth as a war measure had had the effect to abolish the institution in the insurgent territory as fast as it was brought under the control of the Federal forces.

The case of Rives *v.* Duke (105 U. S., 132) is in point. It was an action of covenant growing out of a contract for the sale and purchase of slaves in the State of Virginia made and executed in December, 1863. One assignment of error related to an instruction given to the jury to the effect that, if they found that the bonds were made in reference to Confederate currency, the plaintiff was entitled to recover the amount therein stipulated to be paid at the value of Confederate money compared with national currency at the time of making the bonds. Among other things, the court held:

It was a contract for the sale and purchase of slaves, made and to be performed in that part of the State of Virginia from which the authority of the National Government was excluded by rebel arms, and was made after the proclamation of emancipation issued by the President of the United States had declared all slaves in that district to be free. If the so-called Confederate States should achieve independence, the money of the United States would be the money of a foreign country. If the national authority should be established over the insurgent districts, the slaves, for part of the purchase price of which the payment was to be made, would be free, in fact and in law, and be wholly lost to the purchaser. In view of either alternative, the parties can not reasonably be held to have contemplated payment in any other currency than that of the Confederate States.

For reasons hereinbefore fully stated, the claimant and William Norris were not slaves, in fact or in law, at the time of their marriage in 1864, and for that reason the marriage was valid. The validity of said marriage being the sole question put in issue by the motion for reconsideration, the same is overruled.

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MINOR'S PENSION—CONSTRUCTION THIRD SECTION ACT JUNE 27, 1890.

MINORS OF GEORGE W. DOUGLAS.

The grant in the third section of the act of June 27, 1890, confers title upon the minor children of a soldier separate and independent of that of the widow, and contingent only upon her death or remarriage, and the proviso to said third section relative to the time of the marriage of the widow to the soldier does not extend to or affect the title of the minor children.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 10, 1901.

John B. Meadows, as guardian of the minor child of George W. Douglas, late of Company K, Fourth West Virginia Cavalry, filed an application March 31, 1898, for pension under the act of June 27, 1890, alleging the death of the soldier as occurring October 20, 1895, and the death of his widow (mother of said child), November 19, 1896. The claim was rejected November 11, 1898, on the ground of no title, the parents of the child not having been married until after the passage of said act.

From said action appeal was entered December 2, 1898, upon the contention that the last proviso to the third section of the act of June 27, 1890, "That said widow shall have married said soldier prior to the passage of this act," applies only to widows and not to the children of a soldier, whether they are the offspring of a marriage prior or subsequent to the act.

Reference to the papers discloses that this soldier was a pensioner under the general law, at $24 per month, on account of rheumatism. He died, as alleged, October 20, 1895, and his widow, Elizabeth C., filed her claim under the same law, November 16, 1895, in which she alleged and proved that she was married to the soldier May 5, 1891.

Pending the consideration of her said claim she was remarried May 7, 1896, and she died November 19, 1896. Thus, the only question to be determined in the present case is that raised by the appeal, namely, Does the inhibition in the proviso to the third section of the act in regard to widows who were not married prior to June 27, 1890, to the soldiers on account of whom claims are made extend to the children of said soldiers by such marriages?

The third section of the act is as follows:

That if any officer or enlisted man who served ninety days or more in the Army or Navy of the United States during the late war of the rebellion, and who was honorably discharged, has died, or shall hereafter die, leaving a widow without other means of support than her daily labor, or minor children under the age of sixteen years, such widow shall upon due proof of her husband's death, without proving his death to be the result of his army service, be placed on the pension roll from the

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date of the application therefor under this act, at the rate of eight dollars per month during her widowhood, and shall also be paid two dollars per month for each child of such officer or enlisted man under sixteen years of age, and in case of the death or remarriage of the widow, leaving a child or children of such officer or enlisted man under the age of sixteen years, such pension shall be paid such child or children until the age of sixteen. * * *

The provisions of this law, as they bear upon the title of minor children to pension, has been a great stumbling-block in the minds of many, and various conclusions have been evolved in the different classes or phases of claims arising thereunder. It has been denied by some that there is any direct grant to said children in the law, and that in case no widow survived the soldier pension could not be granted the children, as they might take only upon the death or remarriage of a widow who was a pensioner. However, an early decision of the Department, which is still in force, held differently, as follows:

Where the soldier dies leaving no widow, but a minor child without other means of support than its daily labor, such child is pensionable under the act of June 27, 1890, from the date of filing application. (6 P. D., 40.)

Then, it has been a question with others whether if a widow survived, and since the title of the children is contingent, in a sense, upon that of the widow, they could be granted a pension unless she had first been pensioned and then died or remarried. This view is gained from the peculiar language of the grant in the said third section, and, as will be perceived, it implies that although a widow survived the soldier, to whom she was married prior to the passage of the act, unless she applied for and received a pension under the act, the children could not be pensioned, even after said widow died or was remarried. Such view has not been upheld by the Department, but it has been the practice in such cases to allow pension to the minor children upon the death or remarriage of the widow, notwithstanding she was not a pensioner.

Again, in a class of claims wherein the surviving widow has no title because of having been married to the soldier subsequent to the passage of the act of June 27, 1890, and therefore barred by the proviso to the third section thereof, before mentioned, it has been considered that the minor children could have no title so long as such widow is yet living and unmarried. And this has been the holding of the Department, as will be seen by reference to the decisions in the cases of the minors of La Fayette G. Howard (8 P. D., 230), and the minors of John Davis (9 P. D., 151). The headnotes of these decisions are similar. The former reads as follows:

The minor children of a deceased soldier have no title to pension in their own right under the act of June 27, 1890, while the widow of such soldier is living and not remarried, unless such widow has forfeited her right to pension under the act of August 7, 1882, or section 4706, Revised Statutes, notwithstanding such widow married such soldier subsequent to the passage of said act.

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This holding has good reason to sustain it, for, as stated in the same case:

> It would also be unsafe to grant pension to the minor while a widow survived soldier, as such widow might in the future successfully prosecute a claim in her own right, either under the general or some other law, and we would then be in the position of having granted two pensions on account of the same service.

Further, there is the view which has obtained in the rejection of the claim under consideration, that since the widow who survived the soldier had no title under the act, by reason of the proviso to the third section, neither can the minor children have any after her remarriage and death, they having been born of a marriage which occurred subsequent to the passage of the act. This view evidently depends on the theory, before alluded to, that title in the children is by and through the mother (widow) only. Such theory is not considered tenable for the reason that the general tenor of all the laws makes the service or death of the soldier the basis of title, so that the grant to minor children is separate from and independent of that to widows, except that the one takes effect only after the other has lapsed.

This idea of separateness of title is even borne out by the said third section of the act, if it is read in conjunction with the provisions of the general law (section 4702, Revised Statutes). The two laws should be construed in pari materia, and it may be readily perceived that it was clearly the intention to embody in a more succinct form in said third section the provision for widows and minors in the older law, based on the new conditions named in the first portion of the section. Thus construed the words "such pension shall be paid, etc.," lose that peculiar significance which it has been sought to give them and, instead of relating to the pension granted and belonging to the widow as such, refer specifically to the pension intended to be granted on account of the service and death of the soldier, first to the widow, if she was married to him prior to the passage of the act, then to the minor children upon her death or remarriage. The grant in this section is in effect the same as that under the general law, and was meant to be so.

Thus it is clear that the proviso to the third section, already quoted, has no reference to the title of a minor under the act and since such minor is held to have title in its own right, under this law, as under previous laws, it need not be questioned whether the parents were married before or after the passage of the act so long as legitimacy as a child of the soldier can be established, and it is shown that there is no widow surviving and unmarried.

It is believed this view will bear the test of sound reason and is the only just and logical interpretation of the matter in issue.

It is held, therefore, that the rejection of the claim for the reason stated was error and that action is reversed.

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PRACTICE—ACT JUNE 27, 1890—COMMENCEMENT—INCREASE.

AMBROSE T. SANGUINETTE.

In the adjudication of an original claim for pension under the second section of the act of June 27, 1890, wherein several declarations have been filed, upon the allowance of the claim the pension must commence from the date of filing the declaration under which a pensionable condition was first shown to exist; but if, at the time of the adjudication of such claim, a certificate of medical examination made under the claim shows a condition entitling claimant to a higher rate of pension than existed at the time of the filing of the declaration under which the allowance was made, such original allowance being below the maximum rate, the rate of pension should be increased from the date of such certificate of medical examination (modifying paragraph 6 on page 95 of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898).

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, June 20, 1901.

Ambrose T. Sanguinette, late of Company K, Fourteenth Kansas Volunteer Cavalry, has filed several declarations and affidavits for the purpose of obtaining pension under the act of June 27, 1890. The first of these was filed July 28, 1890. Among the disabilities alleged are rupture of left side, catarrh of head and throat, deafness, rheumatism, disease of heart, kidney trouble, affection of lungs, and general debility. Adverse action was taken in these claims February 12, 1892, December 5, 1893, and August 21, 1896, on the ground of no ratable disability under the act being shown. An appeal was taken January 20, 1899, by the attorney of record, contending that claimant's disabilities were such that he was clearly entitled to a rating.

Pending this appeal another adjudication has been had in the Bureau and a certificate has been issued, by which an allowance of pension was made at $6 per month from August 3, 1893, and $8 per month from June 12, 1897, on account of partial incapacity arising from left inguinal hernia and disease of heart. This action was taken without the consent of the Department or reference to the fact that an appeal was pending, and was in violation of Rule 12 of the Rules of Practice, as follows:

When an appeal to the Secretary of the Interior from the rejection of a claim for pension is filed, and upon examination of the case at the Bureau of Pensions it is found that the claim should be opened for further action, the Department must be informed of that fact and the appeal will be dismissed by the Secretary.

But aside from this irregularity the adjudication was clearly erroneous in other respects. In the first place, the basis of allowance up to June 12, 1897, was an inguinal hernia only, as shown by indorsement on the face brief, as follows:

Approved for left inguinal hernia, $6 to June 12, 1897, and $8 thereafter for same and disease of heart. Latter not ratable prior to June 12, 1897. No other disability affecting rate. Rejections of December 5, 1893, and August 21, 1896, not adhered to. Prior rejections adhered to.

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Now, the certificates of medical examination describing the hernia show it was incomplete and in very much the same condition during all the years between 1890 and 1898. There are three of these certificates. The first, dated June 17, 1891, states:

On left side an incomplete inguinal hernia; the external ring and canal are patulous; the canal and internal ring are very tender and sensitive, and the latter is enlarged, admitting the point of the little finger. The gut does not seem to pass the internal ring, but there is a distinct impulse on coughing.

The next certificate, dated September 14, 1892, states:

On left side an incomplete inguinal hernia; the external ring is patulous and enlarged, and the canal and internal ring are markedly sensitive, somewhat enlarged, admitting the point of the little finger. The tumor is about the size of an almond, but does not protrude from the external ring nor pass into the scrotum.

The third certificate, dated October 16, 1895, states:

The claimant has an incomplete inguinal hernia or bubonocele in left inguinal canal, passing through the internal but not through external ring; oblique. It is only a small tumor in inguinal canal and can be retained by properly fitting truss. The external ring is about 1¼ inches in diameter.

From these descriptions it will be seen, as before observed, that the degree of disability was not materially different at the dates of the several examinations. And this gives rise to two questions: First, was the allowance in the last adjudication on the basis of the mere existence of the hernia, or for the incapacity arising therefrom? And second, if the latter, as it should have been, why was pension made to commence from the date before mentioned, August 3, 1893, and not from the date of the original application, July 28, 1890? Touching the answer to the first question it may be stated that the evidence in the record is stronger for the first than the second basis of allowance mentioned.

As favoring the first, namely, that the existence of the hernia only was the reason for the grant of pension, is the fact above noted, that the degree of disability was substantially the same in 1890 as later; that this degree of disability does not appear, at any time within the period referred to, to have materially incapacitated claimant for earning his support by manual labor; and further, that the rating was not permitted to antedate the schedule fixed by Ruling 245, of December 4, 1891, wherein the rating under the general law for incomplete hernia is $6 per month.

For the other view, or basis of rating, about the only consideration is the fact that the medical referee may be supposed to have regarded the rule under which ratings are required to be made under the act, although it is difficult to understand how he could consider the medical examination of September 14, 1892, as showing incapacity for earning a support by manual labor, while that of June 17, 1891, did not. This he appears to have done, as indicated by a slip attached to the brief.

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The whole record, however, taken together, is convincing of the view that the allowance and rating were made, as before suggested, upon the basis of the mere existence of an incomplete hernia. And this being true, it was in direct opposition to and contravention of the Department's decisions in the cases of Isaac B. Childers and Lucius S. Hollis (10 P. D., 397 and 414). In these this whole matter of the basis of rating under the act, the relation of schedule rates to such basis, and the degree of incapacity from an incomplete hernia was discussed. The head note of the Hollis case is as follows:

Any practice which allows a rating under the act of June 27, 1890, without making the degree of inability to earn a support by manual labor the basis of judgment is unwarranted by law.

A pensionable condition can not be found because designated by a name of a disease or disability, unless such name or designation carries with it the conclusive fact that it embraces conditions which are of necessity of such a character as to pensionably disable one.

Neither the term "complete inguinal hernia" nor "incomplete inguinal hernia" per se conveys any specific information by reason of which a rating could be allowed.

This brings forward the prime issue in the case, as far as the appeal is concerned, namely, Were the rejections complained of erroneous and, if they were, does the last adjudication properly cure the errors and give appellant what he is entitled to under his claims? Preliminary, however, to a discussion of the merits of the case, on the score of claimant's incapacity for earning his support by manual labor, it is proper to point out another error in the last adjudication in regard to the dates employed for commencing the ratings allowed. As stated in the beginning, these were August 3, 1893, for the rating of $6 per month, and June 12, 1897, for the rating of $8 per month. Just what reasons or facts controlled in the adoption of these dates is not understood. It is true that the first is the date of filing an affidavit wherein several disabilities were alleged, as catarrh, disease of throat, affection of lungs and heart, and the other is the date of filing a declaration, in which are alleged rupture of left side, catarrh, rheumatism, debility from age, and asking the benefit of the act of March 6, 1896. But there are, as hereinbefore stated, a number of other declarations and affidavits containing the same or similar allegations. Aside from the original declaration of July 28, 1890, which alleged the rupture of left side, catarrh, and rheumatism, the other declarations were filed August 23, 1895, and June 12, 1897, and the affidavits were filed January 9, 1892, February 3, 1892, August 3, 1893, and April 12, 1894.

If it was intended that the first rating should be upon the authority of the medical examination of September 4, 1892, as indicated by the medical slip attached to the brief, and if it was determined that the rating should not begin prior to December 4, 1891, date of the schedule before mentioned, then it is not understood why the rating should not have been commenced at the date of filing the first affidavit after said schedule became effective, namely January 9, 1892. The original

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declaration had alleged the hernia, or rupture of left side, which was the basis of the pension, and neither of the affidavits mentioned did allege it, but only named other disabilities, not considered in the adjudication as ratable.

Again, when the rating was raised to $8 per month it was clearly on the authority of a medical examination held August 17, 1898, which describes some disease of heart, while no other examination had shown it. The higher rating was based on this disability. If it was intended to commence it from the date of filing a paper alleging disease of heart, why not from August 23, 1895, when the only declaration containing such allegation was filed. It was not in that filed June 12, 1897. It is believed, however, that proper practice would forbid the use of either date, and instead that the date of commencement of the $8 per month rating should have been that of the medical examination showing the disease of heart. This for the reason that the said rating was in the nature of an increase and governed by the rule relative to all increase of pension. Certainly it should apply in this particular case, because the evidence does not show existence of said disease of heart in a ratable degree at the date of filing the papers alleging it, nor at any other time prior to said medical examination of August 17, 1898.

Reverting now to the question whether claimant was entitled to any rating at all under the earlier claims, and whether the rejections were erroneous, it is only necessary to consider the evidence showing his condition in reference to all alleged disabilities. It has been seen that the readjudication is an admission of error as to a portion of said rejections, but it has been likewise seen that the remedy employed, or the readjudication mentioned, was equally erroneous both as to the basis of allowance and the dates of commencement. A careful review of the certificates of medical examination which have been quoted as to the rupture of left side shows that in addition to that disability claimant was found to have very slight disabilities from a catarrhal condition of the throat, impairment of hearing, and rheumatism, for which only small ratings were recommended. It is clear from the descriptions that neither of these, nor all together, can be regarded as materially interfering with claimant's capacity for earning his support by manual labor. At the same time, when taken in conjunction with the rupture of left side and with the fact, shown by the certificates, that claimant has been rather obese, it may be safely concluded that a condition of incapacity has existed that would warrant the minimum rate of pension under the act.

There is no doubt that the small disabilities named have been of a permanent character, and, as shown by the examination of 1898, have somewhat increased in degree. It is also true that the affidavits of one or two physicians on file indicate that the said disabilities were more

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severe than they are described in the certificates. Thus it is that when considered in all its phases the evidence will justify the allowance of the claim from the date of the original application at a rating of $6 per month, with increase to $8 per month from the date of the medical examination in 1898 (modifying paragraph 6 on page 95 of "A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior, April 9, 1898). Accordingly the action as taken in the several adjudications is reversed and the claim is remanded for adjudication in conformity with views here expressed, including such reissue as will correct the errors pointed out.

PRACTICE—REJECTION—NO BENEFIT—DISABILITY.

MARTIN WAGNER.

1. A rating of $6 per month is not commensurate with disability shown in this case to be due to underweight, emaciation caused by malnutrition and neurasthenia, nasal catarrh, and a severe case of bronchial catarrh.
2. A claim under the act of June 27, 1890, which is not fully legally adjudicated has not reached final action.
3. No claim under the act of June 27, 1890, should be rejected on the so-called ground of "no benefit," but the pensioner should be allowed to elect under which law he will draw his pension, notwithstanding the fact that the ratings approved for or allowed under each law are not the same.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 20, 1901.

Martin Wagner, formerly a private in Company B, First Battalion, Eleventh United States Infantry, was pensioned under the general law at $4 per month from July 3, 1886, on account of gunshot wound of neck, and rating was increased, cause being the same, to $6 per month from December 4, 1889. He was allowed a pension under the act of June 27, 1890, at $8 per month, which pension dated from January 21, 1891. His claim was investigated, which investigation resulted in his being dropped from the rolls on November 4, 1894, but he was immediately restored to his old rating at $6 per month under the general law, by reason of gunshot wound of neck. He filed a claim for restoration under the act of June 27, 1890, on October 9, 1896, claim being adjudicated, as shown by the following memoranda on the brief face:

Medical: Gunshot wound of neck and disease of respiratory organs (not legally established), $6, as shown by the evidence now on file, no benefit. Not entitled to restoration June 13, 1898.

Legal: Approved for rejection for gunshot wound of neck, disease of respiratory organs, general and senile debility (the three last not legally established). No benefit as per action of medical referee June 14, 1898.

An appeal was filed on October 3, 1898.

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Upon an examination of this case the actions taken appeared to be similar in character to those in the case of Jonathan Tolle, of Company F, Twenty-third Indiana Volunteer Infantry; and investigation showed that when the Tolle case was originally considered, an opinion being rendered therein on June 30, 1900, said opinion was, in some respects, adjudged by you to be in conflict with former holdings of this Department. You returned said opinion to this Department asking for further information upon the views presented, the views of the Department being thereupon expressed in a communication to you dated October 8, 1900. Said opinion, somewhat at length, disposed of all questions raised by you, and the issues in within case, as heretofore stated, being on parallel lines with those in the Tolle case, it was returned to you with instructions to adjudicate it in conformance with the views of the Department as outlined in the communication of October 8, 1900, and to then return it to this Department.

The papers are now before the Department, but the action requested has not been taken. The brief face has attached thereto a small slip of paper, unsigned, bearing the following:

Bureau of Pensions, Ctf. 346328. Wm. Wagner, B, 1 Battln., 11 U. S. Inf.—See slip of Hon. Commissioner in which he states that the decision in the Tolle case referred to herein was not to be considered as a precedent or in any manner change the present practice of the Bureau.

The slip cited was not found in the case, but in the files of the Tolle case there is a memorandum among the loose papers of which the slip attached to the brief face in the case at bar appears to be a partial but a correct quotation.

The Departmental opinion of October 8, 1900, and which is the one referred to in your slip in the Tolle case, is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, October 8, 1900.

The COMMISSIONER OF PENSIONS.

SIR: In response to your communication, herewith, of August 1, 1900, accompanied by the papers in the case of Jonathan Tolle, Company F, Twenty-third Indiana Infantry, which was decided on appeal June 30, 1900, Docket No. 47952, notice is taken of your comments relative to the rejection of claims filed under the act of June 27, 1890, on the ground of "no benefit," when said applicants are already pensioners under the general law, and suggesting that the decisions of the Department are not altogether consistent.

In view of the fact that the conditions in a given number of cases are not always the same the inconsistences are not apparent, nor does it appear that the action taken in such cases was due to "inadvertence or misapprehension."

The use of the language "rejected on the ground of no benefit" is regarded as unfortunate, and, in a degree, it is unsatisfactory and misleading to the claimant, since the statutes (section 4715, Revised Statutes) distinctly provides that a pensioner may elect which pension he will receive. In other words, he, the pensioner, is granted the privilege of making his own election, rather than being forced to accept the pension which may be presumed to be most beneficial to him.

Your attention is invited to the case of Joseph Muckenstorm, late of Company K, Forty-fourth Indiana Infantry, who was in receipt of a pension at $8 per month

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under the act of June 27, 1890, and who had also applied for pension under the general law. Under date of October 12, 1897, you informed the claimant that the allowance of the latter claim would confer no benefit, as the rate would be less than that paid under the act of June 27, 1890. Hence the claim under the general law was rejected. On appeal, December 7, 1898 (10 P. D., p. 61), said adverse action was set aside under the provisions of section 4715, Revised Statutes, and the first proviso of the second section of the act of June 27, 1890, with the following instructions:

"The practice of rejecting a general-law claim, after its admission, solely upon the ground that it confers no benefit upon claimant because of a previous rating under some other law, and of so notifying claimant, should be abandoned as contrary to law. * * * You will, therefore, at once take such steps as may be necessary to prevent the rejection of such a claim as the one at bar as of 'no benefit.' A claimant is entitled to know the facts, and any notice to him couched in such language as will lead him to believe that a different action has been taken in his claim than that actually taken is not in accordance with good practice."

I infer from your statement that since the rendition of the decision above referred to the rule therein laid down relative to general law claims has been followed by the Bureau, but that the practice of rejecting claims under the act of June 27, 1890, on the ground of "no benefit" has been adhered to where the claimant was already a pensioner under the general law, and this oftentimes without the claim under the act of June 27, 1890, having been legally established.

While it may be true in many cases that a pension under the general law would be preferable to a claimant, yet a prohibition or limitation of his rights under the statute is not permissible. A claimant may have reason for preferring a pension under the act of June 27, 1890, and, as the right of election is conferred by law, it is unlawful and unjust to deprive him of that right. Furthermore, it is observed that the indorsements on the face brief and the letters of rejection are not always uniform. Sometimes the indorsement is simply "Rejection, no benefit conferred;" or "No issue, no benefit," no rate named, and the letters of rejection are not definite as to the true cause of rejection.

It is true that in some instances on appeal the action of rejection has been affirmed in view of the medical evidence and the certificates of examining surgeons, yet the practice or details of formal action have been open to criticism. There appears no good reason why formal action should not be taken in all respects in such claims filed under the act of June 27, 1890, just as though there had been no adjudication under said act or any other former law.

You also invite attention to the practice which obtains in your Bureau of submitting cases for medical action which have not been "legally established," and if, in the opinion of the medical referee, claimant is not entitled to a rate, or to a rate in excess of that paid under the general law, adverse action is taken without further investigation as to the legal aspect of the case.

As a rule, but little is required to legally establish a claim under the provisions of said act. It is observed that in most cases a properly executed declaration which is supported by the records of the War Department is sufficient to legally establish the claim. In some cases evidence as to nature and length of service or as to the existence of vicious habits may be required, but this can cause but little expense or delay.

In his declaration the claimant asserts his rights under the provisions of law, legally and medically, and he is entitled to a proper adjudication of his claim upon all points. The adverse medical action is sometimes unsatisfactory, and an appeal is entered, and the board of pension appeals is confronted with a claim half adjudicated, as in the Tolle case, to which you refer.

As already indicated, a due regard for the rights of a claimant would require a full and complete adjudication of the claim, and after having been legally established, the medical action necessary to indicate the degree of disability existing should be

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obtained. It is also suggested that if adverse action be finally taken the indorsement on the face brief and the letter of rejection should set forth clearly and specifically the reason therefor. I am convinced that if this were done it would reduce materially the number of appeals.

The papers in the case of Jonathan Tolle are herewith returned.

The principles involved were general ones, applicable to a large number of cases, and it is apparent that you so considered them, for you so expressed yourself in your communication of August 1, 1900, to which the departmental opinion of October 8, 1900, was an answer. You stated, in your said communication, that some 6,000 cases, the previous year, involved the same issue. The language used, the issues involved, and the conclusions reached, after an extended discussion, all preclude any theory that the rules laid down in said opinion were of effect only so far as the Tolle claim was concerned. The opinion of October 8, 1900, was designed to cover, and did cover, all cases where the issues discussed arose; its effect was demonstrated to be general by its very terms and tenor, and it should have been so considered by you, not only in the case at bar, but in all cases of like import that have been adjudicated since the receipt by you of said opinion.

The Department does not propose to hold the Pension Bureau to any specific line of detailed procedure which involves the adjudication of cases like the Tolle case and the one at bar. It does, however, hold and order as follows:

First. No claim under the act of June 27, 1890, shall be deemed to have reached final adjudication until all necessary evidence for a legal adjudication has been obtained, and a legal approval or rejection had upon said evidence.

Second. No claim under the act of June 27, 1890, shall be rejected upon the so-called ground of "no benefit," for if a claimant, under the act of June 27, 1890, is entitled to a rating, from a medical standpoint, such rating shall be spread upon the face brief in every such case unless the claim stands already rejected from a legal standpoint.

Third. In the event that a claimant is accorded any rating under the act of June 27, 1890, but is already on the rolls under the general law, he shall be notified of the action taken under the act of June 27, 1890, in clear and unambiguous terms, and no certificate shall issue under said act unless he shall so elect, having been previously notified by you of the rating approved for.

It is evident to those accustomed to deal with appeals in pension cases that the main object of great numbers of appellants is to obtain specific information regarding the status of their cases, or to have a clearer knowledge of the reasons for action taken by you than is given them in the letters of advice sent out upon the subject from the Pension Bureau. This point is referred to in the departmental opinion of October 8, 1900, in the Tolle case, and it becomes daily more and more apparent to the Department that the number of appeals would be greatly lessened if the actions of approval or rejection were plainly

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and unambiguously stated on the brief face, covering all the points at issue clearly and concisely, and the claimant notified of such actions in language and terms which were unmistakable in their meaning, and which would convey to him all the information he was entitled to receive.

The legal questions in this case having been disposed of, there is another question, one of fact, which it becomes necessary for the Department, under the appeal, to consider.

Claimant asserts that he is entitled to be restored to the rolls under the act of June 27, 1890, at a greater than $6 rate, from October 9, 1896, and he was medically examined under this claim for restoration on March 24, 1897. The certificate of examination shows him to be over 62 years of age, 5 feet 2 inches in height, and 119 pounds in weight. His personal appearance was that of a small and slender man, and his body showed emaciation, caused by deranged nutrition, which, in turn, may be the result of neurasthenia. He had a scar 2 inches long across the front of his neck, caused by a gunshot wound, said scar being healthy. He presented a typical case of nasal catarrh, and he had a well-marked and fairly severe form of bronchial catarrh, evidenced by unmistakable conditions not necessary to describe in detail.

It is concluded, after a careful consideration, age being considered a factor, that a rating of $6 per month does not adequately represent this soldier's impairment of physical ability to earn a support by manual labor. Your action in refusing to rate him in excess of $6 per month under his declaration of October 9, 1896, is therefore reversed and set aside, and you are directed to allow him a rate in excess of $6 per month, to date from October 9, 1896.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—APOPLEXY.

EMILY O. DILWORTH (WIDOW).

The soldier's death at the age of 72 years of cerebral hemorrhage can not be properly regarded as due to the gunshot wound through the neck incurred 36 years prior thereto, and for which he was pensioned.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Emily O. Dilworth, widow of Caleb J. Dilworth, formerly colonel of the Eighty-fifth Illinois Volunteer Infantry, filed, April 12, 1900, a declaration for widow's pension under the general law (No. 716822) alleging that her husband—

Died of a disability which originated while in the service and line of duty on the 3d day of February, 1900.

The late officer was a pensioner on account of a "gunshot wound of right side of neck" at the rate of $22.50 per month (three-fourths total of rank).

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The claim was rejected, November 13, 1900, in conformity with the following indorsement by legal reviewer on face brief:

Approved for rejection on the ground that the soldier's fatal apoplexy can not be accepted as due to the gunshot wound of right side of neck for which pensioned. No other disease alleged or proven of service origin shown to be a factor in death cause. See medical action on preceding face brief.

The medical action referred to shows claim approved for rejection on the ground that soldier's death resulted from apoplexy not due to gunshot wound of right side of neck.

The recognized attorneys in the case entered an appeal, November 16, 1900, from the action, contending—

1. Error of fact on the part of the Commissioner of Pensions in holding that the death of the soldier was not the result of the gunshot wound of right side of neck for which he was pensioned.

2. Error of law on the part of the Commissioner of Pensions rejecting appellant's claim on the ground stated.

The argument is advanced that the medical evidence filed in the claim clearly establishes the pathological connection between the wound of the neck and the cause of soldier's death, and such testimony being that of reputable practitioners skilled in their profession, one of whom was familiar with the soldier's case for a period of twenty-seven years, the same can not be lightly dismissed as not sufficient to prove the facts to which it relates. The affidavits filed to sustain the claim are set out in the appeal.

The holdings of the Department in the case of the widow of Charles F. Brown (3 P. D., 92) are also quoted to sustain the claim.

As stated, the soldier was pensioned on account of gunshot wound of the neck. He was last medically examined by a board of surgeons November 2, 1892, under a claim for increase, when the disability was described as follows:

* * * We find the cicatrix 1 inch directly back of the angle of the lower jaw. Cicatrix at point of entrance stellate, 1 inch in length and one-half inch in width. Ball passed backward and made its exit just to the left of second cervical vertebra. Cicatrix at point of exit one-fourth inch wide, 1 inch long, adherent to fascia, and very tender upon pressure. Very tender over all the cervical vertebræ and at point of junction of axis and atlas.

The pulse rate was 78, 82, 110; height, 5 feet 9 inches; weight, 175 pounds; age, 64 years.

A copy of the certificate of death obtained from the office of health commissioner, city of Omaha, Nebr., and filed with the papers in the case, shows death of the soldier February 3, 1900; age, 72 years; cause of death, apoplexy, typhoid pneumonia; medical attendant, L. A. Edwards, M. D.

Dr. Edwards testified in an affidavit filed September 11, 1900, as follows:

That she is a practicing physician and has been acquainted with the above-named soldier for about twelve years, and that I [she] was first called to treat and attend

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Caleb J. Dilworth on the 2d day of February, 1900, about 5 o'clock p. m., for the illness or sickness of which he afterwards died. I found him suffering from severe pains at base of brain, extending in and over left temple region, and twitching of the muscles. During the night of February 2 he became unconscious, the whole right side of the body being paralyzed. Death occurred at 9.45 p. m., February 3, 1900.

My diagnosis of the case is that he died from apoplexy, or possibly an embolism situated in left side of brain.

In my judgment his death resulted from the gunshot wound in the neck received during service in the United States Army in the civil war. The bullet apparently entered the back of the neck in the median line, passing beneath the sterno-cleido-mastoid muscle, and emerged at right side of neck, endangering seriously all tissues situated in its course. The history of his suffering as obtained from his friends confirmed my opinion as to the wound being the direct cause of his death.

By a misunderstanding I made the certificate of death read "Charles J. Dilworth" instead of Caleb J. Dilworth, which is his correct name.

It will be noticed in the certificate that the cause of death assigned therein is "apoplexy, typhoid pneumonia." The words "typhoid pneumonia" were inserted out of abundant caution, and particularly for the benefit of the undertaker, and not as being the direct or contributing cause of his death. At the time I was called in at 5 o'clock p. m. on February 2, the day before his death, the typhoid-pneumonia symptoms were of only short duration and very slight, and he was not confined to his bed, but was only so confined after his stroke of apoplexy had occurred.

There were affidavits of other physicians filed with the case, but none appears to have any personal knowledge as to the cause of death, as the soldier was not treated by any physician other than Dr. Edwards during fatal illness. The other physicians endeavor to show that the bullet in its course injured certain tissues which lead to disease of the nervous system, and that the fatal apoplexy was due to such disease. One affiant, William N. Bancroft, M. D., of Lexington, Nebr., expressed the opinion that—

* * * the primary cause which led up to his death was a deep gunshot wound of the back of neck, which was wholly responsible for the general nerve degeneration and directly the cause of spinal sclerosis and cerebral disease, which was the cause of his death.

It does not appear that this witness saw the soldier within a month of his death. This theory that the disease of the nervous system was a factor in the causation of the fatal apoplexy will be hereafter considered.

It appears from Dr. Edwards's testimony that the soldier died within twenty-nine hours after she first saw him at 5 o'clock p. m. He was then suffering with pain in his head, and during the night became unconscious and was paralyzed on the whole right side. The doctor concluded that this paralysis was due to a rupture of a blood vessel of the brain on the left side, or an embolism.

This latter cause, embolism, is a plug carried from the heart or from some part of the circulation, and when reaching one of the vessels of the brain occludes same, causing transient loss of consciousness of varying duration. Cerebral embolism is a disease of rather early life; cerebral hemorrhage is one of advanced life.

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The history of this case strongly points to a rupture of a blood vessel in the brain rather than to an embolism as the cause of death.

It appears to be an accepted pathological fact that the morbid condition underlying intracranial hemorrhages, which is not due to an injury of the skull, is invariably disease of the blood vessels of the brain and, in most cases, disease of the arteries. It is impossible to rupture a healthy artery by any ordinary physiological or pathological disturbance. Consequently the fundamental facts concerning the pathology of cerebral hemorrhage are those which pertain to arterial disease. (Dana.)

Age is undoubtedly one of the most usual predisposing causes for such degeneration or softening of the walls of the arteries of the brain. This pensioner was 72 years of age; hence had reached an age when such arterial degeneration might be expected.

There is no medical authority to sustain the hypothesis that an ancient wound through the soft tissues of the neck would lead to such degenerative changes in the arteries of the brain and cause death thirty-six years after its incurrence. The affiants in this case, in attributing the fatal apoplexy to a disease of the nervous system, lose sight of the fact that the nervous system is only involved by reason of the disease of the vascular system, and that a disease of the nervous system such as sclerosis, which is said to have existed in this case, was not pathologically related to the disease of the blood vessels which led to the rupture and consequent paralysis.

The action appealed from was therefore in accord with the facts in the case and accepted pathology, and is hereby affirmed.

PATHOLOGICAL SEQUENCE—BLINDNESS—DISEASE OF HEART—SPINAL INJURY.

JAMES FITZGARIELD.

The soldier is a pensioner on account of disease of heart, injury to right shoulder and resulting muscular atrophy, paralysis of right arm and resulting total disability of same. He is totally blind from glaucoma, which is alleged to be a result of neuralgia, caused by a fall from his horse, by which he incurred the injury to his shoulder.

The facts in the case, supported by medical authority, warrant the conclusion that said blindness is due to spinal injury, or to disease of heart, or both. Action reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. July 31, 1901.

James Fitzgarield, formerly a sergeant in Troop F, Fifth United States Cavalry, a pensioner under the general law on account of

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"disease of heart, injury to right shoulder and resulting muscular atrophy, and paralysis of right arm and resulting total disability of same," at $36 per month, filed June 15, 1898, a declaration for increase of rate of pension, in which he alleged increase of disability from pensioned causes, and that—

Application is also hereby made for increase of pension on account of a new disability, to wit: At Fort Robinson, in the State of Nebraska, on or about the 21st of April, 1884, at the time he received the injury to right shoulder, on the above-stated date, he felt a severe pain in his head, which resulted in neuralgia, which disability resulted in the total loss of sight of both eyes; that his physical condition is such that he has to have the aid and assistance of an attendant all the time; that he can not eat, dress, or undress without assistance; he can [not] travel alone or help himself in any manner; that all his right side is paralyzed; that on the above-named date he received an injury to the muscles of his back, which adds to his disabilities.

By medical action dated March 27, 1899, increase of rate of pension was denied on the ground that the rate then paid was commensurate with the degree of disability resulting from causes for which pension had been granted, and that neuralgia of head and alleged results (glaucoma) could not be accepted.

Subsequent to filing this claim for increase a guardian for the soldier was appointed, who, through the recognized attorney in the case, filed April 29, 1899, an appeal, contending, in effect, that injustice was done in rejecting the claim as the disabilities with which the soldier suffers are the results of his military service; that he (soldier) is entirely blind; that he can not walk unaided, and can not dress or undress himself. He states that his head was injured by being thrown from his horse while on duty and that his present helpless condition resulted therefrom.

The papers in the case were forwarded by the bureau to the Department, February 21, 1901, accompanied by a statement of the medical referee to the effect that in view of the condition of the soldier and the imperfect history of the disabling causes then existing a special examination of the claim was desirable with a view of obtaining a clinical history of all disabling causes of a permanent character. The Department concluded that such examination was necessary and directed that same be made.

The reports of the special examiners were duly received; the claim was readjudicated and again rejected on the same ground, and the papers were returned to this office for the disposition of the appeal. Thereupon the case was carefully reviewed, and it appearing to the Department from all the evidence, including that recently adduced, that the claim that loss of sight was due to the pensioned causes was well founded the papers were again returned to the bureau with the request that the Department be informed as to all the reasons why it was not so accepted; that if such conclusion was based upon pathological facts, or upon theory, the same should be demonstrated.

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The papers are now before the Department with the report requested, which is as follows:

In the communication from the honorable Assistant Secretary, of June 4, 1901, a statement is requested from this Bureau as to why the injury to the soldier's spinal cord which he incurred in service is not regarded as a probable cause of blindness as alleged; whether disease of heart for which the soldier is pensioned might be a factor in causing blindness, and the facts or theory on which our conclusions are based.

The soldier enlisted May 14, 1881. The medical records show that he was treated in 1881, three days in July, for acute diarrhea, and four days in November for catarrh. In 1882, four days in March for neuralgia, six days in July for acute diarrhea, four days in October for acute dysentery, and five days in November for acute diarrhea. In 1883, four days in April for tonsilitis. From January 23 to 29, 1884, and again from February 1 to 2, 1884, the records show treatment for neuralgia (malarial), functional disease of the heart, constant increased action of the heart, cardiac pain and at times palpitation. Abuse of tobacco was given as a cause for the heart disturbance, its use was interdicted, and the soldier was returned to duty February 2, 1884, "action of heart normal and cure apparently complete."

From the context it seems probable that the "neuralgia (malarial)" referred to the "cardiac pain" connected with the functional heart disturbance. The other record of "neuralgia" in 1882 showed treatment only from July 9 to 10.

There is nothing in the records to show that the soldier had any disease of any consequence except what may be termed a "tobacco heart," up to the date of his admission on April 21, 1884, for "sprain of right shoulder joint," for which he was continued under treatment until he was discharged on September 9, 1884. The certificate of disability for discharge stated that his disability was "chronic inflammation of right shoulder joint caused by a fall from his horse." * * *

These records were made at a frontier post in time of peace, and consequently would be more deliberately considered than in the hurry, confusion, and excitement of war. Had there been any complications they would have been noted. Dr. Walter Reed, who made the certificate of disability, stated in a communication to the Adjutant-General of the Army under date of April 10, 1885, "It was not known that he (Fitzgarield) had sustained any concussion of the spine or any other injury except severe sprain and contusion of right shoulder, followed by inflammation and stiffness of the joint. I do not believe that the "paralysis of the right leg, neuralgia of the right side of face, neck, right side of chest, head, and stomach" as set forth in the letter of the honorable Commissioner of Pensions, resulted from any injury received by the claimant while in the service.

It is shown that the soldier was under Dr. Reed's observation about a month before he was discharged. The next record of the soldier was on his entrance to the Soldiers' Home Hospital, of Washington, D. C. That record, made October 24, 1884, was "contusion of right shoulder and knee." The following day, October 25, the record was made: "Inflammation of right shoulder joint and injury to brachial plexus of nerves, caused apparently by a blow or fall." From this date to June 26, 1885, the record shows he was treated for "contusion of right shoulder and knee, concussion of spine, and injury of brachial plexus."

The first medical examination was made December 1, 1884, at which time there was shown some marked atrophy of the muscles of the right shoulder and arm, with weakness, loss of mobility, and indications of involvement of the brachial plexus of nerves from the injury to the shoulder. This condition was pensioned as: "Injury to right shoulder and resulting muscular atrophy." This is the only disability that has been admitted as a result of the injury alleged from the fall from a horse in the service. Pension for disease of the heart was allowed in 1885, and the paralysis (hemiplegia) was admitted as a result, not of the injury to the shoulder but of the

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valvular disease of the heart. The hemiplegia is considered as of cerebral origin. There is evidence that intemperance was an important factor in its production, but it is also a possible result of the valvular disease of the heart, and as such result has been admitted. Disease of the spine has not been satisfactorily shown to exist. The symptoms alleged as disease of spine in the declaration of January 26, 1885, were covered by the approval and rate in the medical action of June 8, 1885, and to this action the statement on the brief under date of March 30, 1887, referred.

Upon examination of the soldier on February 20, 1885, the board reported impaired vision of both eyes. There had been no previous complaint of the eyes. On July 21, 1885, the first claim for eye trouble was made—that is, after the examining surgeons had discovered the impaired vision. The certificate of September 17, 1885, shows optic neuritis and nothing suggestive of glaucoma or anything that would lead to it. The examining board's report of March 1, 1887, stated, "tension of eyeballs normal," showing that "glaucoma" had not then developed. When examined March 31, 1897, it does not appear that the attention of the board was called to the eye trouble. The declarations filed March 19, 1896, and September 23, 1896, did not refer to the affection of the eyes. The soldier testified before Special Examiner Walsh: "I was never treated for my eyes at all until August, 1897, when they became inflamed as stated. * * * Dr. Thomas Miller, Washington, D. C., then treated me for my eyes." Dr. Miller testified before Special Examiner Reily: "I don't find a record of treatment on my books. It was about 1897. My recollection of the man is that he was almost totally blind. Keratitis, also iritis, was his ailment. There was a combination of troubles including conjunctivitis. Glaucoma had already set in." The next treatment shown was that by Dr. Coburn, who testified before Special Examiner Walsh: "Upon reference to my book here I find I first prescribed for the said soldier on December 7, 1898. That is the date of the first charge against him, though I may have given him some little office treatment before that date. My principal treatment of him was in the winter of 1898–99. When I was called to see him that time he was suffering with an attack of the grip. Said attack was very stubborn and did not yield easily to treatment. It was about March before he was able to leave his room, having lasted from the preceding December. His condition was very serious during that illness. He had been drinking pretty hard just before that attack, and I attributed the complications of his sickness to the fact of his drinking. He was delirious, and that condition grew worse and he became violent. His stomach refused to work and I had difficulty in correcting that condition. His food at times would pass through him without being digested, and then again he would vomit his food up. No, he did not drink any after I began to treat him that time. The delirious condition lasted all that winter up to March. At times he would be rational but only for a few minutes at a time; then he would become delirious again. I began to despair that his reason would ever return. We were beginning to think about sending him to the insane asylum and that was the time a guardian was appointed for him. I attributed that delirium to the complication of the grip and the condition of his stomach. The condition of his stomach I attributed to his drinking just before he was taken with the grip. I think, though, that if he had not had the grip the delirium would not have followed. * * * I remember now that he has been totally blind since his recovery from that attack in March, 1899."

In August, 1898, just prior to the attack of the grip above described, the soldier was examined by the Doylestown, Pa., board. The report described quite considerable heart trouble, and stated: "This above disease of heart seems to be the result of la grippe, of which he has had two attacks;" so that the attack in December following was the third attack of grip suffered by the soldier. Glaucoma was described as present at that time. The soldier had an examination at home by an expert on March 8, 1899. His statement to the expert in reference to his eyes was

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that "about August, 1897, had acute neuralgia in right eye, followed in twenty-four hours by neuralgia in left eye, the right eye having had slight neuralgia since injury (from fall of horse in the service). Sight began to fail about August, 1897, and since about June, 1898, has been lost." The diagnosis of the expert was: "Glaucoma, chronic and advanced stage, in both eyes; total blindness of both eyes." The report further stated: "Patient has hypertrophy of heart, but the glaucoma has probably resulted from nervous shock, producing hemiplegia; and vascular changes induced by injury."

It is beyond comprehension how an injury such as it is shown this soldier received in the service could produce "vascular changes" or the degeneration of the blood vessels, as the term implies. The hemiplegia described was evidently not due to "nervous shock," but was due, in all probability, to rupture of a degenerated blood vessel in the brain, or occlusion of a cerebral vessel by an embolus or thrombus. It has been accepted as due to the disease of heart. The etiology of glaucoma is obscure. It does not accompany disease of heart, paralysis, or disease of spine with such frequency as to be considered a pathological result.

It is stated in the communication from the honorable Assistant Secretary of June 4, 1901: "The disease causing the blindness has been diagnosticated as glaucoma. * * * It appears to be a well-established pathological fact that injuries of the spinal cord sometimes lead to this disease (Oliver—Text-book on Ophthalmology), particularly when that part of the cord is involved at the juncture of the cervical and dorsal portions." * * * Reference to the text-book noted shows the following statement on page 529, subject, glaucoma: "The rôle played by the nervous system in the increase of the intraocular pressure in man is not well understood. Moreen, however, relates an interesting case of double glaucoma, with a subsequent attack of interstitial keratitis, which was apparently produced by a myelitis of the spinal cord near the junction of the cervical and dorsal portions. In this case the glaucomatous condition was cured by an iridectomy, which was supplemented by the use of mercurial inunctions. He states that he has seen 4 other somewhat similar cases."

Such reports simply demonstrate that in the 5 "somewhat similar" cases the association of glaucoma and spinal disease was observed. A pathological connection was not shown. The idea that perverted nerve supply is causative of glaucoma has been widely held, from the fact that various reflex neuralgias are frequently caused by the increase of ocular tension in its incipient stages, before the true state of affairs has been diagnosticated. Such neuralgias usually subside after an iridectomy, or after the destructive work of the eye disease has been accomplished, thus demonstrating that the glaucoma was the primary cause of the whole trouble. Priestly Smith, in his classic work on glaucoma, quotes a case in which glaucoma attacked each eye successively after losing a game at cards. It will hardly be held that the loss of a game of cards is a cause of glaucoma or other disease of eyes. The Bureau in adjudicating its multitudinous cases must be guided by the commonly accepted rules of pathology alone. If the *post hoc ergo propter hoc* idea were employed, the work would become involved in inextricable confusion.

However, as disease of the spinal cord was not found when the soldier was last examined by a board in 1898, there is no reason for admitting any alleged or theoretical results of the same.

In my opinion the rejection of glaucoma as a result, as alleged, was proper, and it is adhered to.

While this report is of considerable length, it is discursive and does not convey to the Department the reasons why the soldier's blindness can not be accepted as due to his military service.

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A careful analysis of said report discloses that it can be, for purposes of discussion, divided into five different parts.

1. Treating of the record history of the soldier, including deductions from that history.

2. Synopses of medical examinations by boards of surgeons.

3. Evidence filed by the soldier and that obtained by special examination.

4. Consideration of the examination of the soldier by the expert (oculist).

5. Discussion of all the evidence; a consideration of authorities and conclusions reached thereunder.

Referring to the first division of the report, the same sets out that the soldier was treated for diarrhea, catarrh, neuralgia, dysentery, and tonsilitis, but as said diseases have nothing to do with the question at issue they will not be further considered.

In regard to disease of heart, it is stated that there is nothing in the records to show that the soldier had any disease of the heart of any consequence, except what may be termed a "tobacco heart," yet pension was granted on account of disease of heart, and, as will be shown further on, paralysis of right side is regarded by the Bureau as due thereto, and that the rate of pension has been made to cover the disability arising from this cause.

The record further shows that on April 21, 1884, the soldier was admitted (to post hospital) for "sprain of shoulder joint," for which he was continued under treatment until he was discharged, September 9, 1884, on account of chronic inflammation of right-shoulder joint, caused by a fall from his horse. The comment is made that these records were made at a frontier post in time of peace, and consequently would have been more deliberately considered than in the hurry, confusion, and excitement of war, and had there been any complications they would have been noted. This would be generally true, but in the case under consideration it is quite evident that the diagnosis of sprain of shoulder, although deliberately made, was not in all respects correct, as the after history shows that total paralysis of the arm, with symptoms indicating injury of the spinal cord, followed the injury. These disastrous results would hardly follow an uncomplicated sprain of the shoulder. It is true the post surgeon who made the certificate of disability upon which the soldier was discharged from the service stated in an indorsement that "it was not known that he (soldier) had sustained a concussion of the spine," but the fact remains that the records of Barnes Hospital, United States Soldiers' Home, to which the soldier was admitted one month and a half after his discharge, show that he was then suffering with concussion of the spine. The surgeon in charge of this latter hospital, a surgeon long in the United States

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Army, must be considered equally competent to diagnosticate the case. Furthermore, the Bureau has in its several actions on claims for increase indicated that this sprain of the shoulder was far from uncomplicated, the approval reading, "Injury to right shoulder and resulting muscular atrophy and paralysis of right arm."

By further reference to the records of Barnes Hospital, Soldiers' Home, as obtained by special examination, it is noted that—

May 4, 1885, physical examination: In hospital since October 25, 1884; symptoms as indicated; injury to spinal cord; treatment of no value; paralysis progressive, walks with difficulty, etc.

December 11, 1885, to June 9, 1886, locomotor ataxia.

* * * November 24, 1890, constipation, paralysis, left.

April 13, 1896: Right partial hemiplegia, cause unknown. Heart sounds weak; apex over nipple and displacement upward.

Vision impaired more in right eye; right visual field contracted; action of pupils to light normal.

No facial or ocular paralysis.

Right arm: Complete motor paralysis; sensation impaired, atrophied; elbow jerk exaggerated; slight wrist jerks.

Both knee jerks well marked, and about equal. No ankle clonus.

Right thigh somewhat atrophied; motor weakness of right thigh and leg; toe points outward in walking; station normal.

This record affords no information as to time of development of the "hemiplegia," but shows that in May, 1885, the "symptoms indicated injury to spinal cord, paralysis progressive," and from December, 1885, to July, 1886, he had locomotor ataxia.

The record made prior to November, 1890, shows the paralysis was progressive, and from the statement that he walked with difficulty in May, 1885, and had locomotor ataxia in 1886, is strongly indicative that the paralysis was of spinal origin. The record of November, 1890, of "paralysis, left," does not afford any information of value.

The certificates of medical examination made under claims for increase during the period covered by this record afford some information, and will be now considered.

When the soldier was examined the second time, January 20, 1885, by a board of surgeons, it was found that his right arm hung useless by his side; the muscles were atrophied and the circulation feeble. Sensation over right side was defective, and the board expressed the opinion that the condition of his right side might have resulted from an injury such as he claims he had received.

He was next examined one month later, February 20, 1885, when the arm was found to be useless and the right foot everted and was dragged in walking, with impaired sensation in leg. This paralysis of the right leg was evidently the progressive paralysis referred to in the record of the Barnes Hospital.

At this examination it was found that he had but one-half vision in the right eye. Up to this time no claim had been made that vision

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was at all impaired, but the allegation had been made that he suffered with neuralgia of right side of face. Furthermore there was no history of an apoplexy or other cerebral disturbance, and during this period he was an inmate of the said Barnes Hospital.

The Department here desires to emphasize the fact that within one year of the injury there was evidence of loss of vision in right eye of one-half with complaint of neuralgia in right side of face. Up to this time we have no information in regard to the condition of the deep or superficial structures of the eyes.

It was subsequent to the receipt of this certificate of examination that the adjudication was made which included disease of heart and fixed the rate of pension at $30 per month, second grade. A slip filed in the case and signed by the Second Deputy Commissioner of Pensions without date indicates that the soldier addressed a communication to the Bureau complaining that paralysis of his right side and leg should have been included among the results of the injury to his shoulder. In reply, he was informed, under date of July 7, 1885, that the—

Thirty dollars per month allowed by reissue of June 18, 1885, covers also the disability from paralysis of right side and leg.

In the report of the medical referee the statement is made that no other result was admitted as due to the injury from fall from horse other than "muscular atrophy," and that the paralysis, hemiplegia, was admitted as a result of valvular disease of the heart.

This may have been the case, but it appears to the Department that from the soldier's inquiry and the Bureau's reply paralysis was regarded as the result of the injury.

The next medical examination was made September 17, 1885, when the board certified there was no organic disease of heart, the action of which was regular and the sounds normal. There was tenderness on pressure over the lower dorsal and upper lumbar regions, loss of motion in right upper and lower extremities. He suffered with constipation and nonretention of urine. These latter symptoms at this time certainly can not be regarded as due to paralysis of cerebral origin. This board also found considerable engorgement of right optic papilla, amounting almost to a choked disk, the margins of which were cloudy and scarcely definable. The left optic papilla presented much less vascular disturbance, but the disk was somewhat blanched. Vision was considerably impaired.

The medical referee says in his report that there is nothing suggestive of glaucoma in the findings at this examination; but he must know that glaucomatous atrophy of the optic nerve is not infrequently mistaken for simple atrophy; that there are no points of difference upon which absolute reliance can be placed. (Gifford.)

Marked hyperæmia and edema of the nerve head, which afterwards

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becomes cupped, is an early symptom in glaucoma (Knies), and actual neuritis in primary glaucoma usually precedes increased tension (Brailey and Edmunds).

The fact that early positive diagnosis can not be made in some cases, and the further fact that this soldier became blind from glaucoma, makes it almost certain that said disease had attacked his eyes, particularly the right, at date of injury or very soon thereafter. The statement made by the surgeon who examined him March 1, 1887, that "tension of eyeballs normal" proves nothing. This absence of increased tension at this time certainly is not proof positive that "glaucoma had not developed," as stated by the medical referee, as the tension is not always perceptibly elevated early in cases of non-inflammatory glaucoma, and reliance must be placed in the character of the excavation of the optic nerve, but it does not appear that the surgeon examined the deep structures of the eyes. At the date of this examination the soldier could read with No. 14 glasses and see the time by watch without glasses.

In considering the third part of the medical referee's report, in which the testimony filed in the case is discussed, little need be said. The physicians who testified as having treated the soldier in 1897 and 1898 were not in a position to testify as to the progress and nature of the eye trouble. He was then almost totally blind; said physicians were not oculists, and it does not appear that they examined his eyes.

Some emphasis is laid upon that part of the soldier's history testified to by Dr. Coburn, who treated him through a long period of illness consequent upon an attack diagnosticated by the doctor as grip. Mention is also made that this testimony of Dr. Coburn shows the soldier was intemperate a short time before he became ill with grip. But inasmuch as the impaired vision long antedated this time, the illness and intemperance testified to could not be properly considered as etiological factors.

In the fourth part of the report of the medical referee the findings of the expert oculist are considered. This examination by the oculist was ordered by the medical referee, and the said expert was called upon to state the probable cause of the defective vision. The question was asked: "Is it due to disease of heart or an injury, as alleged?"

The specialist found-

R. E. Conjunctival vessels engorged. Cornea clear. Iris dilated and immovable. Lens opaque. Tension +3. Light perception and light projection lost.

L. E. Conjunctival vessels swollen and sluggish. Cornea clear. Iris dilated—does not react to eserine solution. Lens opaque. Tension +3. Light perception and light projection lost.

Diagnosis: Glaucoma, chronic and advanced stage in both eyes. Total blindness both eyes.

Patient is confined to his home by neuralgia and hemiplegia.

Patient has hypertrophy of heart, but the glaucoma has probably resulted from nervous shock, producing hemiplegia, and vascular changes induced by injury.

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As before stated, this opinion as to the probable cause of the soldier's loss of vision was sought by the medical referee, and his inquiry whether same is "due to disease of heart or an injury, as alleged," certainly indicated that he entertained the idea that either of the causes named was or could be responsible for the loss of vision, but it seems that after being advised he does not accept the conclusion of the expert, for he says:

It is beyond comprehension how an injury, such as is shown this soldier received in service, could produce "vascular changes" or the degeneration of the blood vessels, as the term implies. The hemiplegia described was evidently not due to "nervous shock," but was due in all probability to rupture of a degenerated blood vessel in the brain, or occlusion of a cerebral vessel by an embolus or thrombus. It has been accepted as due to the disease of heart. The etiology of glaucoma is obscure. It does not accompany disease of heart, paralysis, or disease of spine with such frequency as to be considered a pathological result.

Dr. J. A. Lippincott (American Text-Book of Diseases of the Eye, etc.) says:

Among the exciting causes may be mentioned various emotions—joy, grief, anxiety, etc.—producing ciliary congestion.

The pathogenesis of glaucoma is not definitely settled. Because of the overshadowing importance of the increase in intraocular tension the aim has been mainly to account for this phenomenon; but half a century of active investigation, clinical, experimental, and anatomical, has not resulted in a completely satisfactory solution of the problem.

When this case was returned to the Bureau the Department took occasion to refer to a medical authority to show that injuries to the spinal cord sometimes lead to the development of glaucoma, the authority apparently basing his conclusion upon reported cases where glaucoma and injury of spinal cord were associated. The medical referee says that—

Such reports simply demonstrate that in the "five somewhat similar cases" the association of glaucoma and spinal disease was observed. A pathological connection was not shown. * * * Priestly Smith in his classic work on glaucoma quotes a case in which glaucoma attacked each eye successively after the loss of a game of cards. It will hardly be held that the loss of a game of cards is a cause of glaucoma or other disease of eyes.

This same author, Priestly Smith, says of glaucoma (System of Diseases of Eye, Norris and Oliver):

The usual exciting causes are disturbance of the circulation which congest the internal vessels of the eye. * * *

The remote causes of glaucoma are very various. They include constitutional diseases, such as rheumatism, gout, syphilis, and many others; disorders of the respiratory, vascular, and nervous systems; injuries of many kinds; morbid growths; congenital imperfections and senile changes.

It would hardly be held that the loss of a game of cards is a cause of glaucoma, but it would be held that the emotion produced by such loss might cause glaucoma. Priestly Smith undoubtedly related this

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case to show the effect of powerful emotion upon the vascular supply to the eye; "a disturbance of the circulation which congests the internal vessels of the eye." Dr. Lippincott says the various emotions, joy, grief, and anxiety, produce ciliary congestion.

If violent emotion, however occasioned, causes intracranial and intraocular vascular disturbance leading to glaucoma, an injury such as this soldier received would appear to be quite as efficient a cause for the glaucoma which, from the evidence, had its beginning not long after said injury.

The medical referee concludes his report with the statement—

> However, as disease of the spinal cord was not found when the soldier was last examined by a board in 1898, there is no reason for admitting any alleged or theoretical results of the same.

This statement that "disease of the spinal cord was not found" is hardly warranted from the following description in the certificate of the nervous phenomena:

> Now has complete paralysis of right arm, both as to motion and sensation, extending to midsternum from center of spine and from above clavicle to border of ribs. Sensation entirely absent over this part, and below and down leg on right side it is impaired.

Paralysis of sensation and of motion of thorax to the extent here indicated can not usually be regarded as due to a cerebral lesion or to an injury of the brachial plexus. Furthermore, as heretofore shown, the soldier manifested symptoms indicative of spinal lesion and impaired vision long before the development of the hemiplegia, and besides, the fact should not be lost sight of that "hemiplegia may possibly be caused by a unilateral lesion seated in the upper portion of the cord." (Solis-Cohen and Eshner Essentials of Diagnosis). In 1885 the "symptoms indicated injury to spinal cord, * * * paralysis, progressive; walks with difficulty."

When the papers in this case were returned to the Bureau for a statement of reasons for not accepting blindness as due to the spinal injury, the Department stated that "there is medical authority to sustain the claim," and the criticism of the medical referee of this conclusion does not cause a change of views. Because a pathological connection between an injury of the cord and glaucoma can not be demonstrated, it is not, in the opinion of the Department, sufficient cause for denying such connection.

It would be just as reasonable to deny pension on account of loss of vision of both eyes, when pension has been allowed on account of loss of vision of one for injury, and the other became blind from sympathetic ophthalmia. In such case the pathological connection can not be demonstrated, yet no physician would deny that such is not an everyday clinical observation. The Bureau is certainly not "guided by the commonly accepted rules of pathology alone" in cases of such character, but by clinical facts.

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Another feature of this case appears to deserve consideration, and that is, whether or not disease of heart, for which the soldier is also pensioned, might be a factor in the causation of glaucoma.

No less an authority than Priestly Smith says: "Disease of the vascular system" is sometimes a cause of glaucoma. The medical referee attributes the pensioner's hemiplegia to disease of the heart, thrombosis, or embolism. It would seem that a disease of the heart causing such grave vascular changes within the cranium would create "disturbance of circulation which congests the internal vessels of the eye" and cause glaucoma, as stated by the author quoted.

It is noted that the medical referee states in the latter part of his report that—

> If the post hoc ergo propter hoc idea were employed the work would become involved in inextricable confusion.

Such a statement is not warranted, for it is apparent that a large number of claims for pension are, and always have been, admitted as proved by the application of such a maxim. Not only is this true from a legal but also from a medical standpoint. When the law has to go into any science other than mathematics, and mathematics is the only science by which truths can be demonstrated without the possibility of error (1 Greenleaf on Evidence, sec. 1), it has very frequently to reach conclusions which are based upon propositions arrived at by reasoning from the effect back to the cause, although, as a matter of course, it is more satisfactory to reason from cause to effect; but this can not be done in a large number of cases.

The foregoing opinion is based, so far as the facts in evidence allow, upon a demonstration that, given certain condition as a cause, a certain effect has followed. Not that such an effect would always result from said given condition, but that the evidence shows that it has done so in this case.

From the facts in the case, supported by medical authority, the Department is led to conclude that this soldier's loss of vision from glaucoma is chargeable to his military service, either as a sequela of the spinal injury or of disease of heart, or both. The action appealed from is accordingly reversed, and the papers in the case are herewith returned.

AID AND ATTENDANCE—RATE—EVIDENCE.

JOSEPH LEWIS.

The appellant is pensioned at the rate of $30 per month (second grade) for gunshot wound of left arm and injury to left chest and resulting disease of heart and epilepsy.

From the facts presented in the case it is shown that he has frequent (almost daily) and severe epileptic seizures, necessitating the frequent and periodical personal aid and attendance of another person.

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Held: That the aid and attendance of another person which the appellant actually requires, as well as has, is such frequent and periodical aid and attendance of another person as is contemplated by the act of July 14, 1892, and entitled him to the rate prescribed in the said act from January 11, 1899, the date of the medical examination showing the necessity for such aid and attendance.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

In consequence of the rejection by the Bureau, on January 12, 1900, of a claim for increase filed May 26, 1897, in the case of Joseph Lewis, late private Company B, Ninety-fourth Ohio Infantry, an appeal has been filed wherein it is contended that the appellant's condition is such that at times he requires the regular and at others the frequent and periodical personal aid and attendance of another person. And a reversal of the action taken is asked—

For the reason that the proofs on file in this case show clearly and positively, by medical evidence and by testimony of numerous people, that he is now and has been for a long time in such condition, by reason of his pensioned disabilities, and requires almost constant aid, assistance, and care of another person; and that he can not go about to any extent without the aid and care of another person.

That he believes the evidence on file in his case is ample, full, and convincing as to such facts, and hence such claim should have been allowed.

The appellant is now pensioned at the rate of $30 per month (second grade) for "gunshot wound of left arm and injury to left chest and resulting disease of heart and epilepsy."

It was alleged in the said application for increase that the said pensioned causes of disability totally incapacitated the claimant for the performance of any manual labor; that they were of such a nature as to necessitate the "constant care, assistance, and aid of another person," and that they were "constantly increasing in disabling force."

The medical examination of the soldier, made in pursuance of this claim for increase, was ordered through the medical referee under specially prepared instructions, with a view to ascertaining whether or not the "claimant is so greatly disabled from pensioned causes and sequelæ alone as to require the periodical aid and attendance of another person."

The claimant alleged, as will be noted, that he required the "constant," not the "periodical," personal aid and attendance of another person.

After describing all the objective as well as certain subjective signs of disability, as directed in the aforesaid specially prepared instructions, the board by which the claimant was examined expressed the opinion that he—

undoubtedly requires the aid of another person whenever away from home, as the seizures are of daily occurrence and come on without warning.

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Although the statement of the board is somewhat qualified as to the amount of personal aid and attendance of another person required by the pensioner, the evidence—both medical and lay—filed in support of the said claim for increase is of much more positive character. However, in view of the nature of the disability on account of which, it is contended, the soldier requires the aid and attendance of another person, the evidence of those having daily intercourse with him, and personal knowledge of the manifestations of the disability in question, is, without doubt, superior to an opinion based upon a physical examination—at which but few rational signs of such cause of disability might be present; yet there is little doubt but what the said board intended to convey the idea that the claimant did require the frequent and periodical personal aid and attendance of another person by reason of the oft-recurring epileptic seizures.

As hereinbefore stated, however, the Bureau rejected the claim now under consideration January 12, 1900, assigning as a reason for such adverse action that the "frequent and periodical aid and attendance is not shown to be required."

The action in question was based upon medical grounds, namely: That, in the judgment of the medical referee, the degree of disability described in the certificate of the aforesaid medical examination, and in the evidence filed in the case as well, was not such as to warrant the conclusion that the pensioner required the said aid and attendance of another person—either frequently, periodically, or regularly; but, as a primary consideration of this proposition, it may be stated that the Department has repeatedly held that questions of this nature are not wholly medical in character, but are largely matters of fact. And there can be no question as to the propriety of permitting facts to outweigh theories. (See cases of Edmund O. Beers, 7 P. D., 113; John J. Hill, 7 P. D., 585; Ira W. Hayford, 9 P. D., 307.)

The objective conditions described in the said certificate were as follows:

Pulse rate, 88–96–120; respiration, 16–18–24; temperature, 98; height, 5 feet 6¾ inches; actual weight, 134 pounds; age, 56 years. Hair and beard very gray, hair scant; face careworn and haggard; skin dry, wrinkled, and icteric; eyes sunken; form bent; muscles soft; skin of palms dry and wrinkled; slight arcus senilis; poorly nourished. Gunshot wound of left arm; point of entrance, 5 inches below acromion process on anterior surface of arm, and 8 inches above exterior condyle humerus. Scar three-fourths by one-half inch diameter, whitish color, slightly depressed, not adherent or dragging, somewhat painful; exit 6¾ inches above exterior condyle humerus, on outer and posterior surface of arm. Scar 1 inch by five-eighths inch diameter, bluish white, slightly depressed and dragging and painful; missile passed through biceps and triceps muscles. Circumference: Left arm—at wound entrance 9½ inches, at exit 9½ inches. Right arm, same points, 10½ inches. Left forearm 3 inches below elbow, 9 inches. Right forearm, same point, 10 inches; no other disparity. No loss of tissue from wound, the disparity being result of general atrophy of muscles. Contractile power of left hand impaired three-fourths. Motion not limited.

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Injury to left chest: Circumference 2 inches below nipple—expiration 31, inspiration 33½. Left side, expiration 16, inspiration 16½. Right side, expiration 15, inspiration, 17 inches. At the angle of sixth and seventh ribs is a bulging of left side, result of former fracture of said ribs. There is dullness on percussion over lower lobe left lung. Auscultation gives a weakened and jerky respiratory murmur over left lung. No râles, no cavities, or hepatization. Over lower portion of left side are pleuritic adhesions, possibly traumatic.

Disease of heart: Apex beat, not evident by inspection or palpation, is located in sixth space, just external to mammary line, by auscultation. Epigastric pulsation. Cardiac dullness increased down and to left, rhythm very irregular. First sound metallic, second sound muffled. During systole there is a muffled friction sound, evidently pericardial; hypertrophy of left ventricle. Dyspnœa is marked; cyanosis and œdema of feet.

Epilepsy: Claimant says he has almost daily attacks of falling to the ground, and has true epileptic seizures every week to ten days. Upon the slightest exertion the face becomes cyanosed, conjunctival vessels dilated, eyes staring, breathing panting and irregular; pulse quick and irregular, but no stronger; gait uneven and stumbling; a general muscular tremor. Tendo-reflex exaggerated. No paralysis; no aphasia, speech being fairly good. Mental condition somewhat impaired as to prompt response to inquiries. No tenderness of spine or head. Pupils of normal size and respond to light and shade readily. Hearing normal. No hyperæsthesia or anæsthesia. Tongue is anæmic, pointed tip; does not deviate on protrusion; stomach tender and dilated; liver and spleen normal; bowels not tender, but slightly tympanitic. Arteries are slightly atheromatous. We get no evidence of any specific trouble, either by history or examination of claimant. The attacks vary from a few minutes to one-half hour, according to statement.

Claimant undoubtedly requires the aid of another person whenever away from home, as the seizures are of daily occurrence and come on without warning. We find no other disabilities, no evidence of any vicious habits.

Among the affiants testifying in support of the appellant's claim for increase is one physician, Dr. J. W. Means, of Troy, Ohio, who stated in an affidavit filed November 26, 1897, that—

Joseph Lewis needs constant attention, and it would not be safe for him to be alone night or day on account of his heart disease and epilepsy. His attacks, are frequent and severe. I have been called frequently to attend him in his attacks, and know that they come on him suddenly and at any time, thus needing constant watching. It requires the employment of some one to take care of him all the time, which service is usually rendered by his wife, daughter, and son-in-law.

Howard Shearer and Mini I., his wife—daughter of the appellant—testify, in a joint affidavit filed November 26, 1897, as follows:

We are son-in-law and daughter, respectively, of claimant, and live in same house with him. We personally attend said claimant each and every day, especially when he goes away from home, and dare not let him get out of our sight or reach by reason of his condition of disease and helplessness from disease of heart and epilepsy and resulting injuries received as a soldier in line of duty.

We personally know said claimant is daily attended and assisted by his wife, also, and that his condition is such that he can not be left alone safely; and he needs the constant aid and attendance of his wife or of these affiants by reason of his said disabilities.

Rebecca C. Lewis, the wife of the claimant, testified that for the last twenty-five years or more she has been the personal attendant and

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assistant of the soldier; that each and every year of said time she has had to render him almost constant aid and assistance by reason of his disabilities resulting from his army service; that during all of said time, as well as at the present time, he has been and is subject to epileptic fits, and is liable to fall in same at any moment, and that affiant is consequently obliged to be constantly near him, observing him and helping him, and that he can not get along without the constant aid and attention of herself or of others.

C. W. Penrod, a neighbor, testifies, in an affidavit filed December 27, 1897, that he has known the claimant for the past twenty-seven years; that he knows that the statements made by the wife, daughter, and son-in-law of the soldier are true; that he, himself, has assisted in carrying the pensioner to bed at various times when he has had epileptic seizures; that he has had the attacks ever since affiant's acquaintance with him; that it is not safe for him to be left by himself at any time; that he needs the constant care and attention of another person; and that these facts are known to affiant by reason of his living as a near neighbor to him and seeing him nearly every day.

Jacob Meyer, who says that he has known the soldier for twenty-five years, and has lived more or less of that time in the same house with him, testifies substantially to the same facts set out in each of the affidavits referred to above.

It would seem, then, from the foregoing, that, as a matter of fact, the appellant in the premises does receive the regular personal aid and attendance of another person; but, in view of all the facts presented for consideration in the case, it would appear that much of such aid and attendance of another person as it is declared the soldier actually receives could be dispensed with, as it is clearly rendered more by reason of apprehension that it might be required than on account of any real necessity therefor. Yet this very apprehension or constant fear and anxiety on the part of the appellant's relatives, who care for him in his affliction, is a more or less important factor to be considered, as their solicitude for his welfare and safety is largely due to the fact that it is impossible to tell at what moment their services may be required, and it is by reason of such fact that more time and attention is devoted to him than is, perhaps, necessary. In this respect he is more of a care and responsibility than one who merely requires the services of a second person at stated intervals for specific purposes. However, in the judgment of the Department, it is reasonably well established that no inconsiderable part of the aid and attendance of another person received by the appellant—by reason of his unfortunate affliction—is actually required as well as rendered, and that the amount of aid and attendance of another person that he does require is such as to bring his case within the purview of the provisions of the act of July 14, 1892.

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While it is difficult to determine from the facts presented and the evidence adduced in the case just how much aid and attendance of another person the appellant does or does not require, there is, nevertheless, no reasonable doubt but what he requires fully as much, if not far more, personal aid and attendance of another person than do many other pensioners who have been allowed the rate prescribed by the said act of July 14, 1892.

In the case of John Johnson (9 P. D., 349) it was held—

That inasmuch as the services of another person are required at least twice daily in the adjustment of the pad which the pensioner is compelled to wear over his right shoulder for its protection, the said services are considered as such "frequent and periodical personal aid and attendance of another person" as is contemplated by the act of July 14, 1892, and warrants the allowance of the rate prescribed by the said act.

In the case cited the pensioner could dress and undress, except in so far as adjusting the said pad was concerned, and he was otherwise in good physical and mental condition and earning a good support as a clerk in one of the Executive Departments. Although the Department decided, upon appeal, that the aforesaid pensioner was entitled to the benefits of the provisions of the act of July 14, 1892, such conclusion was not arrived at until the papers in the case had been remanded to the Bureau for a personal opinion of the medical referee as to whether or not the rejection of the appellant's claim for increase was, in the light of the contentions set up in his appeal from such adverse action, still believed to be proper. At the same time, however, it was suggested that before submitting such opinion the certificate of the last medical examination held in the case should be returned to the board of surgeons by which the examination was made for a further report as to the objective conditions manifested thereat. The said suggestion was adopted, and upon the receipt of the said certificate as amended the medical referee expressed the opinion that—

The degree of disability shown in this case is greater than that resulting from the "specific disability" loss of arm at shoulder joint, and frequent and periodical personal aid made necessary in the adjustment of the pad is believed to come within the provisions of the act of Congress approved July 14, 1892, creating the intermediate grade of $50 per month, and this pensioner should be so rated from the date of the medical examination made November 15, 1897.

The foregoing conclusions of the medical referee were arrived at notwithstanding the fact that the said amended certificate contained the following expression of opinion on the part of the examining surgeons:

We think he requires the use of a pad, based upon the (subjective) tenderness over wounded area. He requires aid and attendance to properly adjust pad as worn by claimant, but we believe a protective pad could be worn, said pad forming a portion of shoulder to coat on wounded side, thereby offering protection and doing away with the necessity of aid.

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In commenting upon this feature of the case, however, the Department held that—

The question raised by the board of surgeons as to the necessity for the aid and attendance of another person being avoided by the claimant having the protective pad which he is compelled to wear form a portion of the shoulder of his coat on the wounded side is a contingency which does not appear to have been considered by the act of July 14, 1892, to the benefits of which the claimant appears to be entitled by reason of the said aid and attendance; nor is there any other law by which he could be compelled to use any other method for the protection of his shoulder than that which he himself elects.

And in the case of Ira W. Hayford (9 P. D., 307) the Department held—

When it is established beyond any reasonable doubt that, on account of pensioned cause or causes, or any pathological sequelæ thereof, the pensioner is not only "totally incapacitated for performing manual labor," but can neither dress nor undress himself without the aid and attendance of another person, as is shown by the evidence and certificate of medical examination in this case, the Department will construe the said aid and attendance as such frequent and periodical personal aid and attendance of another person as is contemplated by the act of July 14, 1892, and as warranting the allowance of the rate prescribed in the said act.

As will be noted, in each of the cases above cited the services of another person were required but twice daily in assisting the pensioner to dress and undress, and yet it was held in each case that the allowance of the $50 rate was warranted by the facts presented.

In the case at bar the character of the services rendered the pensioner differ, necessarily, from those accorded in the cases cited; but it is the necessity and frequency, not the character, of such services that determines the question at issue in the premises. In the cases cited the aid of a second person is required at stated and regular intervals, presumably but twice daily, morning and evening, while in the case under consideration the frequency of the necessity for such aid and attendance is limited only by the conditions which arise from day to day. The board of surgeons by which the appellant was last examined stated that his epileptic "seizures are of daily occurrence and come on without warning." It is not shown by the evidence that convulsions attend all of these seizures, but it is shown that they are sufficiently frequent and are severe enough to render the services of another person necessary a large part of the time. It is true, perhaps, that he is given much more attention than he actually requires, if the evidence in the case is to be relied upon, as it is stated therein that he is watched and cared for constantly as though he were an infant; but, as hereinbefore announced, the amount of aid and attendance he actually requires, as well as has, is sufficient to bring his case within the purview of the provisions of the act of July 14, 1892.

In the case of Ellie Morris, widow (9 P. D., 353), it was held that—

A child who is an incurable epileptic, having a falling fit once a week on an average, and nervous attacks much oftener, who is vigorous in body, but dull men-

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tally, who is able to attend to his personal wants, except when suffering from an epileptic seizure, and can perform some remunerative labor, but not nearly sufficient to afford him a support, is "permanently helpless" in the contemplation of the law, and the pension on his account should be continued.

The appellant in the case under consideration is in a much worse condition than is the minor in the case cited, who was reported to be "vigorous in body and able to perform some remunerative labor," though he is held to be "permanently helpless in the contemplation of the law," as this appellant is wholly incapacitated for the performance of any manual labor whatever, is poorly nourished, has a severe gunshot wound of left arm and injury of chest—with fracture of two ribs; and is suffering from a serious organic disease of heart—with well-marked dyspnœa and cyanosis, and œdema of feet.

In addition to the essential features of the case herein set out, there is one circumstance which appeals strongly in the appellant's behalf. In an affidavit executed June 12, 1900, it is stated by two of his neighbors that his wife—upon whose kindly care and attention he had relied for so many years, according to the testimony in the case—had been stricken with paralysis and was no longer able to render the service upon which he had so long depended; that he was dependent upon neighbors and friends for the care, watchfulness, and attention of another person; that he has no means of support other than his pension; that no one is legally bound for his support, and that he is in financial and bodily distress.

For the reasons above stated, the action appealed from is reversed, and the Bureau will proceed to readjudicate the aforesaid claim for increase in accordance with the views herein set forth. And, inasmuch as the claim has been made special, the action indicated will be taken at as early a date as practicable.

DEATH CAUSE—PATHOLOGICAL SEQUENCE—CATARRH.

FLORENCE E. FOSTER (WIDOW).

Soldier's death from pulmonary tuberculosis can not be accepted as due to nasopharyngeal catarrh, on account of which he was pensioned at $2 per month, and it not appearing that catarrh was otherwise a factor in the death cause, nor that said cause was the result of his army service, the rejection of the claim on that ground was proper.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Florence E. Foster, widow of David M. Foster, a sergeant in Company I, Ninth United States Infantry, and private, ordnance detachment, St. Louis Arsenal, Mo., filed August 2, 1890, a declaration for widow's pension, alleging that her husband "died from disease con-

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tracted during his term of service, at Washington, D. C., the 26th day of July, 1899." Claim is numbered 703000.

At the time of his death the soldier was a pensioner on account of malarial poisoning, injury to right ankle, and naso-pharyngeal catarrh.

The widow's claim was rejected March 19, 1901, in conformity with the following indorsement on the face brief by a legal reviewer:

Approved for rejection. The cause of death, disease of lungs, was not due to the pensioned disabilities (malarial poisoning, injury to right ankle, and naso-pharyngeal catarrh), nor is it shown on special examination to have been otherwise due to service. See action of medical referee on former brief.

The medical action referred to shows the claim approved for rejection on the ground the soldier's death resulted from disease of lungs not due to causes for which he had been pensioned.

The recognized attorney in the case entered an appeal April 17, 1901, from this action, contending that the soldier was a pensioner on account of nasal catarrh; that said disease in its progress involved the bronchial tubes and ultimately the lungs, and resulted in death of the soldier. It is further contended that the adverse action was taken without proper knowledge of the circumstances of the soldier's illness as to its inception, progress, and final termination; that it is an established fact in medical science that disease of lungs results from nasal catarrh.

The issue then is whether or not the fatal disease of the lungs was a result of nasal catarrh.

The soldier was allowed a rate of $2 per month on account of disability resulting from naso-pharyngeal catarrh by medical action of April 5, 1895, under a declaration filed January 4, 1893. This nominal rate appears to have been based upon the statement made by the board of surgeons which examined him July 6, 1894, under the claim that there existed "well-marked post-nasal and pharyngeal catarrh." There was no description of the condition. It is noted that when he was previously examined, June 2, 1892, he stated to the board that he had "catarrh at times," but no evidences of said disease were present at the time of this examination. During the period the soldier's name was upon the pension rolls he was an employee of depot quartermaster's office, Washington, D. C., and at the time of his death was superintendent of quartermaster's stables.

Previous to the action rejecting the widow's claim a special examination was made and the testimony was taken of three physicians who were more or less acquainted with his physical condition.

Dr. Elmer Sothoron testified that he commenced treating the soldier in July, 1895, and continued to treat him off and on until Dr. Carter commenced treating him. In July, 1895, he treated him for catarrh of the stomach, one of the worst cases he ever saw. He always had pain in stomach and abdomen and hardly passed a day that he did not

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vomit mucus. It was usual for him to work with a temperature of 100° to 101°. He saw him twice after Dr. Carter commenced treating him and still thought the disease was the same. His opinion was that the original trouble was gastric catarrh. He examined his sputa many times, but did not make a microscopical examination. He made a physical examination about 1897 and found no cavities in lungs and no evidences of tuberculosis. He at no time thought he had tuberculosis. The mucus vomited was slimy; his tongue was heavily coated and the edges red, the characteristic tongue of gastric catarrh. There were times when he could not keep anything on his stomach. He noticed this at one time when he called after Dr. Carter commenced treating him.

Dr. Francis S. Nash testified that he took charge of the army dispensary in June, 1898, and was in charge until December, 1898. Not long after he took charge the soldier came for treatment. He examined him and was satisfied he had pulmonary tuberculosis. In June, 1898, the soldier had cavities in his lungs and was considerably weakened. Catarrh existed in 1898, but the witness did not know how long it had existed. He saw the soldier occasionally after June, 1898. He got gradually worse and the disease progressed until he died. He saw him within a week or ten days before he died. There was no question as to any other disease but tuberculosis. "The catarrh was not a factor in death cause."

Dr. E. C. Carter, surgeon, United States Army, testified before the examiner that he came here (army dispensary) in December, 1898, and saw the soldier soon afterwards, first at the dispensary and later at his house, and treated him until he died. His first diagnosis was nasopharyngeal catarrh and tuberculosis. The exact cause of death was exhaustion from tuberculosis of lungs. At some time during his treatment he examined his lungs and found cavities therein. In his "opinion catarrh was the original disease, and that tuberculosis existed because of the catarrh." While under his care the effects of pulmonary tuberculosis obscured the effects of catarrh, so he can not say how much of a factor, if any, the catarrh was in causing death. He is unable to state whether Foster would have died from tuberculosis if catarrh had not existed.

This physician signed the return of death made to the health office. This certificate shows cause of death, "tuberculosis—catarrh." Duration of last sickness, "six weeks."

The history of the case as revealed by the medical evidence, including certificates of medical examination, shows that the catarrh of nose and throat was of minor importance.

Dr. Nash expressed the opinion that said disease was not a factor in death cause.

Dr. Carter could not express an opinion as to how much of a factor, "if any," the disease was in causing death, and he was unable to state

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whether the soldier would have died of tuberculosis of the lungs had not catarrh existed.

Bartholow, in his Treatise on the Practice of Medicine, says of catarrh:

> Although there is no danger to life, the disease in its chronic form is difficult to cure. The popular notion that extension to the lungs takes place is entirely unfounded. In the phthisical, the existence of nasal catarrh and pulmonary lesions, which is very common, is often supposed to mean the dependence of the latter on the former.

Hence, it would appear that Dr. Carter's theory that "catarrh was the original disease and that tuberculosis existed because of the catarrh" is not in accord with the observed facts in these diseases. That pulmonary tuberculosis is a fatal disease and catarrh of nose and throat never kills are ordinary observations of physicians and laymen.

The soldier was discharged from the military service August 24, 1878, at his own request, by way of favor, and in 1893 filed his claim on account of catarrh originating in the service, and in 1895 the condition was such as to warrant the allowance of a rate of only $2 per month, and this nominal rate appears to have been made in an absence of description of the condition.

It is concluded from all the facts presented that the soldier's death from pulmonary tuberculosis was not due to naso-pharyngeal catarrh, as contended, or otherwise shown to be the result of his military service.

The action appealed from is accordingly affirmed.

EVIDENCE—RECORD—STATEMENTS BY CLAIMANT.

RANSOM J. CHASE.

The evidence to overcome a positive adverse record, made from statements of a claimant, should be clear and convincing.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Ransom J. Chase, formerly sergeant, Company C, Eighteenth Wisconsin Volunteer Infantry, who is drawing $6 per month under the general law, and was so pensioned as a sergeant, filed an appeal to the Department January 31, 1899, from the refusal of the honorable Commissioner of Pensions to grant him a rating under said law as a second lieutenant, it being alleged that he contracted chronic diarrhea while he held a commission as such officer.

In his appeal the claimant makes the following contentions:

1. I stand mustered as second lieutenant as of September 10, 1862, having been promoted from first sergeant of my company.

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2. My resignation was dated January 19, 1863, based upon a certificate of disability of the same date made by Dr. Buck, surgeon at that time in charge of the regiment.

3. The pension certificate issued to me pensions me under the rank of sergeant instead of second lieutenant.

4. In explanation of the certificate so issued the Pension Bureau called attention to the certificate of disability made by Dr. Buck, dated January 19, 1863, in which he refers to my disability as having existed for "five" months. "Five" months prior to January 19, 1863, would be August 19, 1862.

5. The period thus fixed in Dr. Buck's certificate took me by surprise, as I had performed the most arduous duty during the entire fall of 1862, having taken part in the Iuka campaign in September, and having taken part in the battle of Corinth and the pursuit of the enemy following that battle in October, 1862, and having after that performed duty to the very last days of October, and being left behind on November 2, 1862, which time the regiment moved. The nature of my military services was such during that period that I was able to establish the same by the affidavits of Capt. R. S. McMichael and Comrade H. L. Baker, and I was not compelled to fortify the same by my own affidavit. Besides the affidavits of the two comrades mentioned, I filed an affidavit from Dr. Buck himself, who states that he had read Captain McMichael's affidavit and that the statements therein contained were true, and that he has no remembrance of treating me for any trouble until some time after the return of the pursuit of the enemy following the battle of Corinth. The time of such return is, I believe, established by the affidavits as October 12, 1862.

6. Notwithstanding the convincing character of the three affidavits referred to, the Pension Commissioner declined to consider them because such proof would show a different state of things than that stated in the certificate of Dr. Buck, now on file in the War Department. In other words, no matter how erroneous and no matter how much proof might be produced showing my arduous military services after August 19, 1862, it avails nothing whatever as against the mistake of somebody, who, in writing the certificate of disability signed by the surgeon, erroneously inserted the word "five." I inclose and attach a communication from the Commissioner of Pensions.

7. Since then, at your request at the War Department that my record be in some way corrected, in view of the proof filed in the Pension Office, you are informed, and I am informed through you, there is no authority of law for the War Department to make any change, as it is simply the custodian of the records in its office and has no lawful authority to change them. We are referred back to the Pension Bureau as the proper tribunal to decide upon the weight of evidence upon the question involved.

8. Presenting again the matter to the Pension Bureau, you are informed that its previous action is final.

9. I make the point that the honorable Commissioner of Pensions is in error in treating as absolutely conclusive the statement in the certificate of disability, wherein the word "five" was used, and that such a paper is not and should not be treated as absolutely conclusive. It is not an adjudication made by any court in a case there pending. I insist that in this matter the applicant may establish the facts by any competent evidence, which includes the affidavits of himself and his comrades, and if such evidence conflicts with the statement in the certificate of disability it is a case where evidence should be weighed and the matter decided in accordance with the weight of evidence. It is not a case where the most conclusive evidence is to be thrown aside. I venture to state that no one can read the affidavits of Capt. R. S. McMichael, of H. L. Baker, and Dr. Buck himself without concluding that the decision of the honorable Commissioner works an injustice in my case. In other words, it is clearly established that the word "five" is erroneous.

10. I respectfully ask that the proof referred to herein, together with the communication from the Commissioner of Pensions of December 8, 1898, and the letter

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from the War Department dated January 17, 1899, may be considered by the honorable Secretary of the Interior, and that he take proper action therein, and that the decision of the honorable Commissioner of Pensions be reversed, and that a certificate be ordered issued to me under the rank of second lieutenant.

The letter of the honorable Commissioner, above referred to, is as follows:

You are advised that your request, filed March 24, 1898, for a rehearing of the case relating to the question of the rank held by you at the time your pensioned disabilities were contracted, together with the testimony of Henry L. Baker, R. S. McMichael, and Dr. Erastus J. Buck bearing upon the question, has been carefully considered, but that it does not warrant a change of the action of this Bureau in placing your name on the pension roll as a sergeant, for the following reasons: It can not be accepted to controvert the records of the War Department, which show that you were mustered as a second lieutenant September 10, 1862, the date of the occurrence of a vacancy in that rank, and the certificate of disability on which your resignation was accepted, dated January 19, 1863, stated that you suffered with the chronic diarrhea and general debility for five months, thus bringing the date of incurrence prior to September 10, 1862, and while you were an enlisted man. No action is now pending in the case.

Through a member of Congress the claimant herein applied to the War Department to have the discharge certificate corrected, and following is the reply of that Department:

Referring to your letter of the 12th instant, received on the 13th, relative to the case of Second Lieut. R. J. Chase, Company C, Eighteenth Wisconsin Infantry Volunteers, in which you request that the case of this soldier be considered in connection with the evidence on file in the Pension Office, with a view, it is presumed, to the amendment of his record to show that the disability for which he was discharged was contracted after he assumed the duties of second lieutenant, the Pension Office having decided that, inasmuch as the report from this office showed that his disability existed five months prior to his discharge, he should be allowed a pension only as of the grade of sergeant, I have the honor to advise you as follows:

The records show that Ransom J. Chase was enrolled December 18, 1861, and was mustered into service January 20, 1862, as a corporal in Company C, Eighteenth Wisconsin Infantry, to serve three years; that he was promoted fourth sergeant, April 8, 1862; first sergeant, June 16, 1862; was mustered in as second lieutenant, same company, to date September 10, 1862; and that he was discharged the service, as second lieutenant, in special orders, Department of the Tennessee, dated January 23, 1863, on tender of resignation, accompanied by a certificate of the surgeon of the regiment, dated January 19, 1863, showing that Lieutenant Chase "had suffered from chronic diarrhea and general debility for five months."

This record is clear and positive, is not in itself contradictory, is not contradicted by any of the official records, and was certified to as correct by the officer authorized to make it, who is himself shown by the records to have been continuously on duty with the regiment for nearly a year prior to the issue of the certificate, and this Department, therefore, which is simply the custodian of the records in its possession, has no lawful authority to change them, in such a case as this, in any way so as to make them show anything other than what they now show in regard to the disability for which this officer was discharged. Such authority could only be conferred upon this Department through additional legislation by Congress.

An examination of the papers on file in the Pension Office in this officer's claim for pension shows that the evidence relied upon to overturn the record of the duration of the disability for which this officer was discharged is simply the testimony of

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Lieutenant Chase and comrades, including the surgeon of the regiment himself, to the effect that he (Chase) did not actually contract his disability for which he was discharged until after his assumption of his duties as second lieutenant, and that the certificate of the surgeon that it was contracted five months prior to January 19, 1863, is therefore erroneous. Neither this testimony, however, nor any testimony, can warrant this Department in changing a clear and positive record.

The question as to what weight shall be given this testimony in the consideration of this officer's claim for pension, and whether or not it is sufficient to outweigh the record evidence of this Department in the case so as to entitle him to a ension as of the grade of second lieutenant instead of that of sergeant, is one not for this Department, but for the Pension Office, to decide.

This appeal raised the question whether the disability for which the claimant is seeking pension was contracted while he was a second lieutenant.

Section 4696, Revised Statutes of the United States, provides:

Every commissioned officer of the Army, Navy, or Marine Corps shall receive such and only such pension as is provided in the preceding section for the rank he held at the time he received the injury or contracted the disease which resulted in the disability on account of which he may be entitled to pension. * * *

It is to be observed that to entitle an officer to pension as of a certain rank the law provides that he must have "contracted the disease which resulted in the disability" while he held such rank. It is not a question of when the disability resulted, but when the disease was contracted.

On the question of the date at which the ulcerated stomach and chronic diarrhea for which the claimant seeks pension was contracted the record contains a copy of a certificate of disability for discharge, which is as follows:

Lieut. Ransom J. Chase, of the Eighteenth Regiment Wisconsin Infantry, having applied to me for a certificate on which to ground a resignation, I do hereby certify that I have carefully examined this officer and find that he is now suffering from pyrosis, and that he has frequent attacks of diarrhea, and, further, that he has suffered from chronic diarrhea and general debility for five months, and in consequence thereof he is, in my opinion, useless to the service.

The above certificate was dated January 19, 1863. It will thus be seen from the quoted certificate that the claimant first contracted chronic diarrhea on or before August 19, 1863, about a month before he was mustered in as a second lieutenant.

An examination of the above certificate discloses that the most of it was based on statements made to the surgeon by the claimant. All the ailment that was disclosed by the examination was "pyrosis." The examination could not disclose that he had "frequent attacks of diarrhea" or that he had "suffered from chronic diarrhea and general debility for five months." It is manifest that the claimant gave the surgeon this information.

In a very few cases the doctrine of strict estoppel is applied in pension cases, such as proof of divorce estopping a party from denying

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a marriage, and in cases like the one under consideration a principle analagous to estoppel may well be applied.

In the case of John H. Ruhl (8 P. D., 351), the Department said:

When a soldier has procured his discharge by reason of his own false statements, which statements are recited in his certificate of discharge, he will not be allowed in a pension claim to deny the truth of these statements, but he may attack the fact that he made such statements, since fraud or mistake on the part of those who made the record are always open to proof.

In the case of Charles G. Lewis (4 P. D., 328) the Department held:

When an officer applies for and receives a certificate of disability to accompany his resignation, his action in the premises raises the presumption that the facts stated in said certificate are admitted by him to be correct, and he is estopped, after a lapse of many years, from denying their correctness, except upon testimony of the most positive and conclusive character.

It was said further in the same opinion:

It is clearly apparent that the adverse recitals in a certificate of disability, where such certificate is made the ground of a tender of resignation by an officer, are entitled to far greater weight as against said officer, upon the principle relating to estoppel, than a certificate which is not so used as a basis for resignation. In the claim now under consideration it will not admit of doubt that the claimant knew the contents of the certificate which was made by his fellow-officer, the surgeon of his regiment, and, by basing his resignation thereon, he acquiesced in and adopted the statements contained in said certificate and made them his own. Ordinarily, such a certificate can be overcome only by convincing testimony tending to impeach the certificate for fraud or other sufficient reason, and thus removing the ground of estoppel.

The contemporaneous statements of the claimant, made of record, for purposes of which he took advantage, are under all rules of evidence to be construed most strongly against him.

The claimant in his appeal avers that he was taken by surprise at the statement in the discharge certificate that he had suffered from chronic diarrhea for five months prior to January 19, 1863. There is no evidence in the record which establishes that such statement in the certificate was not made by the claimant, and thus no ground for the surprise as averred appears. Dr. Buck, who made the certificate, filed an affidavit in December, 1898, in which he says he can not account for that statement being in there.

The undisputed evidence is that the claimant continued to do duty as second lieutenant from the date of his muster in as such officer until about November 2, 1862. At that time the claimant asserted he contracted ulceration of the stomach and chronic diarrhea. The medical records of the War Department show that he was treated in hospital from November 7 to 10, 1862, for "remittent fever," and from February 7 to 11, 1863, "diarrhea."

The claimant resigned from the service February 11, 1863. It will be noted that the allegation of the claimant that he contracted chronic

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diarrhea and ulceration of the stomach in November, 1862, is met by a positively adverse record.

The evidence of the captain of claimant's company and his comrades that he performed the duties of second lieutenant up to November, 1862, is by no means conclusive evidence that he did not contract chronic diarrhea in the month of August before.

We have his positive statement to the surgeon that he did contract diarrhea five months before he prepared to resign. The claimant can hardly be heard, now that over a third of a century has elapsed, in contradiction of his own recorded statements. Evidence as to his performing his duty as an officer does not go to the point in issue.

There has been no impeachment of the record here, either on the ground of fraud or mistake. It tells the same story it told when the officer secured his release from further service on account of it, and stands as a true recital of the facts it contains. If it stands at all it is conclusive of the facts it recites. When it falls it does so through a direct attack on the ground of fraud or mistake. Any other rule would subject records solemnly made to the caprice and treacheries of memory. It is not safe to invade those rules which have been thrown about duly certified records of any character, and much less a record which was made at the suggestion of a person for one purpose and acted upon by him, when long afterwards the same person seeks to give it another meaning for an altogether different purpose.

It is concluded there was no error in the Bureau action and the same is hereby affirmed.

MARRIAGE—ACT OF JUNE 27, 1890—DIVORCE.

DRUCILLA WALKER (WIDOW).

Claimant's marriage to the soldier in 1878, he having at the time a former wife living who was not divorced from him until 1896, was null and void, and as claimant was not and could not have been legally married to the soldier prior to the passage of the act of June 27, 1890, she can have no title to pension under said act by reason of the proviso to the third section thereof.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Drucilla Walker, as the widow of Isaac Walker, late of Company B, Forty-first Iowa Volunteer Infantry, and Company L, Seventh Iowa Volunteer Cavalry, filed her applications October 30, 1899, and November 9, 1899, for pension under the act of June 27, 1890. The claim was rejected June 13, 1901, upon the ground of "no title; the claimant was not the legal wife of the soldier at date of the passage of said act, he not having been divorced from a former wife until after the passage of the act." From this action an appeal was taken July 8, 1901,

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in which, after reciting the facts as to soldier's marital relations and referring to certain departmental decisions, it is contended that claimant became the legal wife of the soldier after the divorce of his first wife, although, as admitted, her marriage to him was at first invalid; and further that she is entitled under the act of June 27, 1890, notwithstanding the marriage did not become valid until after the passage of said act.

The soldier was a pensioner under the said act of June 27, 1890, at $12 per month. He died September 30, 1898. It is shown by a verified copy of the public record of Stone County, Mo., that he was married to this claimant July 25, 1878. At the time, however, he had a former wife living and undivorced. It is shown by a certified copy of the decree that said former wife was granted a divorce from the soldier by the circuit court of Vernon County, Mo., in December, 1896, or more than eighteen years after his marriage to this claimant.

It is shown that, after the removal of the impediment by the divorce obtained in 1896, the soldier and claimant continued to live together until his death in 1898. In view of this it is contended that it should be presumed that their marriage became lawful by mutual consent under the operation of an implied contract. It is further contended as follows:

> It is believed it was not the intention of the lawmaking power to declare that where an applicant shall have married a soldier in good faith by formal ceremony some twelve years prior to the passage of the act referred to, and shall have lived with said soldier for twenty years thereafter, that a legal impediment which was not removed until some six years subsequent to the passage of the act shall constitute a bar to the grant of a pension.

There is only one material question in the case. The last proviso in the third section of the act of June 27, 1890, is as follows:

> *And provided further*, That said widow shall have married said soldier prior to the passage of this act.

The claimant could not, under any existing law, have become the lawful wife of the soldier at any time prior to 1896, when the first wife obtained her divorce. That date, being subsequent to the passage of said act, under which she claims title, she does not, under the specific terms of the proviso, have a pensionable status under the same. The marriage of the claimant and the soldier in 1878 was void—a mere nullity—and any valid marriage which might have occurred in 1896, or thereafter, can have no retrospective operation which would legalize or impart validity to their relations from the inception thereof. Such a holding would be manifestly untenable, for the reason that it would operate to bestow a lawful relation between the soldier and two living wives during the period intervening between the years 1878 and 1896, a condition which is not tolerated by existing laws.

The action complained of was without error and is hereby affirmed.

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ATTORNEYS—FEE—MATERIAL SERVICE—DECLARATION.

JOHN FITZPATRICK (CLAIMANT).
PATRICK H. CONEY (ATTORNEY).

The filing of an amendatory declaration in a claim for original pension under the act of June 27, 1890, at any time prior to the holding of a medical examination, is material service and may entitle an attorney to the fee.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Patrick H. Coney, of Topeka, Kans., on May 16, 1901, entered an appeal from the action of the Bureau in the matter of fee on the issue of May 25, 1900, in the claim for pension under the act of June 27, 1890, of John Fitzpatrick, who served in Company I, First Maryland Volunteer Infantry.

In behalf of the soldier, on April 30, 1891, William H. Limbocker, of Manhattan, Kans., filed a declaration for pension under the act of June 27, 1890, in which were alleged gunshot wound of right leg and injury to right leg as disabling causes. The claim was rejected, and Mr. Limbocker was so advised February 9, 1892.

James M. Graham, of Manhattan, Kans., in behalf of the soldier, on May 29, 1894, filed another declaration for pension under the act of June 27, 1890, in which were alleged injury to the right shoulder and injury to head as disabling causes in addition to those alleged in the declaration filed April 30, 1891, by Mr. Limbocker. This claim was rejected, and Mr. Graham was so advised December 20, 1894. He filed, November 23, 1896, a third declaration under said act in behalf of the soldier. The claim was rejected, and Mr. Graham was so advised October 5, 1897. He filed a fourth declaration November 2, 1897, in which were alleged varicose veins of both legs, disease of bowels, and general debility as disabling causes in addition to those alleged in prior declarations. He filed evidence on November 20, 1897. A medical examination was held December 8, 1897.

The appellant on June 30, 1898, filed a power of attorney, and on October 17, 1898, filed another declaration in the claim in which dyspepsia was alleged as an additional disabling cause. On the same date he filed a medical affidavit as to the soldier's inability at that time for the performance of manual labor on account of broken right clavicle, gunshot wound of right leg, fracture of skull, and disease of stomach. He called up the case February 10 and September 21, 1899, and May 7, 1900. Another medical examination was held May 3, 1899.

Mr. Graham was suspended from practice before the Bureau on February 1, 1899, and has not been reinstated. He was called upon November 20, 1899, for evidence of continuance of inability to earn a support from November 2, 1897, date of filing declaration, to May 3,

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1899, date of holding medical examination. In response to this call Mr. Graham filed evidence December 5, 1899. He was again called upon January 9, 1900, for proof of origin of wound of right leg. In response thereto he filed, Jannary 23, 1900, the claimant's affidavit. On May 25, 1900, certificate issued to allow pension at $6 per month from November 2, 1897, date of filing declaration by Mr. Graham. On said issue the fee was paid to him, hence this appeal.

It was error for the Bureau to call upon Mr. Graham for evidence after he was suspended from practice. As further services by an attorney were required before the claim could be allowed, the fee was not earned by Graham. Therefore his rights in the case terminated upon his suspension from practice, and thereupon the power of attorney in favor of the appellant became operative. So the question whether the appellant is entitled to a fee turns upon the fact whether he rendered any material service in securing the pension allowed. As noted, he filed, on October 17, 1898, a declaration and a medical affidavit.

Paragraph 7, page 95, Treatise on the Practice of the Pension Bureau, reads as follows:

> Where a claim under the act of June 27, 1890, has been rejected on the ground of no ratable disability and the claimant files a new declaration, alleging the same disabilities set forth in his prior application, or additional disabilities not heretofore alleged, a new medical examination may be ordered.

Generally the filing of a new declaration for pension under the act of June 27, 1890, is material service. It has been recently held that the filing of a new declaration in behalf of a person whose claim for pension under the act of June 27, 1890, stands rejected is material service if the declaration is the first one filed after rejection (case of William Hunton, certificate No. 746663, dated March 11, 1901, 38 Fee P. L. Bk., 396).

Also, in a pending claim for original pension under the act of June 27, 1890, when a new declaration containing allegations of the existence of cause of disability not before alleged is deemed amendatory declaration (case of James J. Abbott, 8 P. D., 79), the filing of such declaration is usually considered material service. Likewise, in a pending claim for original pension under the act of June 27, 1890, when a new declaration is filed in which new disabling causes are not alleged, the filing of said declaration is deemed material service where it serves a purpose which the filing of an amendatory declaration would serve—for instance, as fixing the date of commencement of pension. An amendatory declaration has always been deemed material service when filed in a claim prior to the holding of a medical examination. Under this test the amendatory declaration filed by the appellant was material, as it was filed October 17, 1898, and a medical examination was held May 3, 1899.

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It has been pointed out that the power of attorney in favor of the appellant became operative. Although said power did not become operative until after the appellant rendered material service, said service would entitle him to the fee; for—

Evidence filed by a duly authorized attorney when not entitled to recognition is actual service, and it inures to his benefit if he becomes entitled to recognition at any time before the claim is prima facie complete, and may entitle him to a fee. (Case of Elishup P. Allen, 9 P. D., 19.)

As appellant acquired the attorneyship, rendered material service in the claim, and was in good standing when the claim was allowed, it was error to deny him a fee. Accordingly, the action of the Bureau is reversed. It is directed that a copy of this decision be served upon Mr. Graham.

ATTORNEYS—NEGLECT—FEE—INCREASE.

McKINZY HARSHFIELD (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

The rule that when a claimant does not comply with an order for medical examination, and thereupon the failure of the attorney on notice thereof to file the claimant's request for the issuance of another order constitutes neglect, is limited in its application to claims for straight increase.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, July 31, 1901.

Milo B. Stevens & Co., of Washington, D. C., on July 11, 1900, entered an appeal from the action of the Bureau denying them a fee on the issue of January 30, 1900, in the claim for pension under the act of June 27, 1890, of McKinzy Harshfield, who served in Company I, One hundred and eighty-eighth Ohio Volunteer Infantry.

In behalf of the soldier on March 26, 1891, appellants filed a declaration for pension under the act of June 27, 1890. The claim was rejected and appellants were so advised March 18, 1895. They filed another declaration for pension under said act December 27, 1897.

On March 28, 1898, the claimant was ordered for medical examination at Cleveland, Ohio, and appellants were so advised. He failed to appear and appellants were so notified December 13, 1898, and at the same time they were informed that the claimant's written consent must be filed before another order for medical examination would issue.

James M. Marshall, of State Soldiers' Home, Erie County, Ohio, filed another declaration for pension under the act of June 27, 1890, in behalf of the soldier. A medical examination was ordered through him and held May 10, 1899. On June 6, 1899, Mr. Marshall was called

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upon for the correct name of the soldier and for evidence of continuance from December 27, 1897, date of filing declaration by appellants, to May 10, 1899, date of holding medical examination. This evidence he filed June 6 and November 27, 1899.

Certificate issued January 30, 1900, to allow pension from December 27, 1897, at $6 per month. On said issue Messrs. Stevens & Co. were denied a fee, hence this appeal.

The Bureau assigns neglect for denying appellants a fee upon the ground of their failure to file the claimant's request for another medical examination.

Neglect upon the part of an attorney to comply with the rules of practice in the prosecution of a case will work a forfeiture of rights. However, it never has been held that the failure of an attorney in an original claim for pension to file a claimant's request for medical examination would constitute neglect. The rules of practice have not imposed upon the attorney an obligation to file such request in the above-mentioned class of claims within any limited time, and it is not believed that it would be equitable to do so. An attorney is required to file the evidence necessary to prima facie establish a case. This he is able to do without the cooperation of a claimant. In fact the practice contemplates the performance of such services on his part, and if he fails in this particular, although his failure is due to the want of cooperation on the part of the claimant, the attorney must suffer the penalty of neglect. But where the claimant refuses to file a request for another medical examination, it is beyond an attorney's effort to satisfy the demand of the Bureau. In such an event the penalty has fallen upon the claimant, the one to whom the failure is due. It would not be just to hold an attorney, after he has prima facie completed a claim for pension, responsible for the action of the claimant and inflict upon the attorney a penalty because of the claimant's conduct.

It is true that in claims for straight increase of pension the rules require that an attorney, under the penalty of neglect, shall file the claimant's request for the issuance of another order for medical examination where he has failed to comply with such an order. (See case of Robins E. Babcock, 7 P. D., 285.)

Upon the subject presented as an issue in this case the Department found occasion in the case of William H. Johnson, certificate No. 174867, decided October 21, 1899 (34 Fee P. L. Bk., 245), to remark as follows:

> It appears that at and for some time prior to the death of Mr. Lemon (the attorney in the case), there remained nothing to do in the case except to hold a medical examination. In fact, the case awaited a statement from the claimant as to his willingness to comply with an order for medical examination. In no instance has it ever been held by this Department that failure upon the part of an attorney to file such statement or otherwise proceed to secure another order for medical examination when one has not been complied with constituted neglect in an original claim.

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Under the conditions the claim awaits a medical examination, and whenever held the fee is certified upon the allowance of the claim to the attorney in good standing to whom it would have been paid had the prior order for medical examination been complied with by the claimant. Now, this case was completed by Mr. Lemon: it awaited the holding of a medical examination, and, whenever held, he was entitled to the fee upon the allowance of the claim. It is true that in claims for straight increase, under penalty of neglect, an attorney is required to explain a claimant's noncompliance with an order for medical examination. The reasons are that claims for increase can be abandoned, and when abandoned another claim for increase can be filed. But in original claims for pension abandonment rarely occurs, and therein the date of commencement of pension is not affected by the holding of a medical examination.

The foregoing was quoted with approval in the case Alexander Brown, certificate No. 582612, dated May 21, 1901 (39 Fee P. L. Bk., 315).

The rule has been limited in its application to claims for straight increase. In but one instance has it been applied in any other class of claims, and that was where the Department affirmed the action of the Bureau denying an attorney a fee in a claim for restoration under said rule. The attention of the Department was not called to the error, for such it was, and due to oversight as to the class of claims to which belonged the claim under consideration.

For the foregoing reasons the action of the Bureau in denying the appellants a fee upon the ground assigned is reversed. It is directed that a copy of this decision be served on Mr. Marshall, the attorney to whom the fee was paid.

DESERTED WIFE—ACT MARCH 3, 1899—DIVORCE—JURISDICTION.

ELIZA MCKEE *v.* JAMES H. MCKEE.

It appearing from a duly certified copy of the court record that pensioner was divorced from the claimant, who seeks a division of his pension under the act of March 3, 1899, prior to filing such claim the record also showing that said court acquired jurisdiction over said alleged deserted wife in the suit for said divorce, she was not pensioner's wife and is not entitled to receive one-half of his pension.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. August 22, 1901.

Eliza McKee, alleged wife of James H. McKee, late sergeant Company C, Ninety-second Ohio Infantry, and a pensioner under certificate No. 173339, appealed by her attorneys June 4, 1901, from the Bureau action of April 6, 1901, rejecting her claim for one-half of her husband's pension, filed November 26, 1900, under the act of March 3,

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1899, on the ground that she was "not now pensioner's legal wife, he having secured a divorce from her in the circuit court of Cedar County, Mo., October 9, 1891."

Due notice of the appeal has been served upon the appellee who has filed his answer to the appeal.

It is contended, in brief, that said decree of divorce is void for the reason that the Missouri court never acquired jurisdiction of claimant, she being at the time the resident of another State, and never received notice of pensioner's application for divorce; citing the cases of Nancy E. Scott (6 P. D., 185) and Josephine G. Boyd (8 P. D., 1); also Freeman on Judgments (2 ed., sec. 127), and Wells on Jurisdiction of Courts, page 28.

These authorities, as well as the more recent departmental decision in the case of Annie M. Shipp (11 P. D., 226), enunciate the well-known rule that where jurisdiction depends upon substituted or constructive, as contradistinguished from personal, service of notice, the court record must show a strict compliance with the statute providing for service by publication, in order to sustain the judgment or decree.

In the Scott case (6 P. D., 185) no publication of notice was made as required by the statutes of Missouri.

In the Boyd case (8 P. D., 1) the published notice required the defendant to answer on a day prior to the completion of the publication required by the statutes of Nebraska, and was therefore defective and conferred no jurisdiction upon the court, and the decree was therefore void for want of jurisdiction.

In the Shipp case (11 P. D., 226), decided February 8, 1901, the statutory provision of Indiana as to service of notice on the defendant was not complied with, and the court therefore did not acquire jurisdiction.

All of these decisions are based upon the rule that statutes providing for constructive service of notice by publication, being in derogation of the common law, must be strictly followed.

In the case under consideration there is nothing to indicate that the statutory provisions of Missouri, as to substituted or constructive service of notice by publication, was not strictly complied with, or that the court granting the pensioner a decree of divorce from the claimant October 9, 1891, was without jurisdiction, but, on the contrary, it appears that all jurisdictional facts were shown.

The evidence in this case fails to show that claimant is the wife of pensioner, he having been divorced from her prior to the passage of the act of March 3, 1899.

The action appealed from is accordingly affirmed.

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FEE—ATTORNEYS—MINOR'S CLAIMS—PRO RATA FEE.

MINORS OF DAVID G. MILLER (CLAIMANTS).
W. W. DUDLEY (ATTORNEY).

In a minor's claim for pension, when, upon issue of certificate to allow pension, payment of the share of one claimant is withheld under the instructions of the Secretary of the Interior dated January 14, 1901, the entire fee of the attorney prosecuting the case shall be paid pro rata from the shares of the other claimants to whom pension is paid upon and at the time of said issue.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 22, 1901.

W. W. Dudley, of Washington, D. C., on May 24, 1901, entered an appeal from the action of the Bureau in the matter of fee on the issue of April 4, 1901, in the claim for pension under the general law of the minor children of David G. Miller, deceased, who served in Company D, Eighty-eighth Ohio Volunteer Infantry.

On June 26, 1901, the appeal was dismissed by the Department upon the report of the Bureau dated June 3, 1901, in which it was set forth that the contention of the appellant relative to the fee on said issue was conceded by the Bureau. The Bureau has moved to reinstate the appeal. In report dated July 10, 1901, it is set forth that the motion to dismiss was made under the belief that the entire pension had been paid to the claimant, Lydia E. Miller, which led the Bureau to concede the appellant's contention for a fee of $25. The Bureau bases its motion to reinstate the appeal upon the ground that only a minor's share of the pension has been paid to the claimant, Lydia E. Miller, and argues that this fact fully sustains its action in denying the contention of the appellant for the payment of the entire fee. The appellant has been notified of the Bureau's motion to reinstate said appeal. No objection has been interposed. As it appears that the Bureau adheres to its action refusing to certify the entire fee to Mr. Dudley, the attorney in the claim, the appeal from said action is reinstated.

In behalf of Harvey Miller and Lydia E. Miller (now Swank), the children of David G. Miller, deceased, on September 12, 1890, the appellant filed a declaration for pension under the general law. He filed the evidence adduced in the claim and on November 11, 1890, filed articles of agreement stipulating for the payment of a fee of $25.

The claimant Lydia E. Miller (now Swank) attained the sixteenth year of her age on July 1, 1884; the claimant Harvey Miller attained the sixteenth year of his age on April 19, 1878.

Certificate issued April 4, 1901, to allow pension in the claim with direction that the share of Lydia E. be paid to her and the share of Harvey be withheld under instructions of the Secretary of the Interior dated January 14, 1901. Said direction has been observed. On said

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issue the sum of $12.50 was certified to the appellant for his services in securing the allowance of pension in behalf of Lydia E. The Bureau refused to certify to the appellant the remainder of the fee, hence this appeal.

Under the instruction of the Secretary of the Interior payment of a minor's pension to claimants who attained their sixteenth year prior to July 1, 1880, and who did not file a declaration for pension prior to that date, is withheld.

The appellant argues that the Commissioner of Pensions has reduced (scaled) the contract fee and that the Commissioner is without any warrant of authority to take such action, citing the case of Granville Todd (3 P. D., 383).

The Bureau states the practice to be, when pension is allowed to two or more claimants as minor children and the share of one is withheld for the reason that his post-office address is not known or for other cause, that such portion of the entire fee is paid as the number of shares of pension paid to claimants bears to the total number of shares, and the remainder of the fee is paid as the remaining shares are paid. The practice as thus stated contemplates the allowance of pension to all the claimants for a minor's pension on account of the military service and death of their father, and no reasonable objection is suggested for any change as to the payment of fee where the facts in a case are like those set forth. But in the present case it will be noticed that the title to pension of one of the claimants, Harvey, is in doubt. Payment of pension is withheld awaiting the determination of the question by this Department whether a claimant is entitled to a minor's pension where he attains his sixteenth year before the 1st of July, 1880, and does not file a declaration for such pension prior to that date. So it is uncertain whether appellant is entitled to any pay for prosecuting a claim in behalf of the claimant Harvey. In the event that payment of pension is made to him, then appellant would be entitled to pay for such services. But if such payment be forever withheld upon the ground that the claimant Harvey forfeited his right to pension by reason of his failure to file a declaration for pension prior to July 1, 1880, the appellant would not be entitled to any pay for services rendered in his behalf.

However, the title of the appellant to a fee of $25 in no way depends upon the fact that he secured a minor's pension for the claimant Harvey. He is entitled to such fee for securing pension for the claimant Lydia if the claimant Harvey is not entitled to pension, and the entire sum is payable from her pension in the event that the claimant Harvey is without title to pension. So the fee is earned at the stage of the proceedings which has been reached in this claim whether or not the payment is made of the share of Harvey. The fact of such payment does not enter into the title of the appellant to a fee of $25; it

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enters into the questions as to what time it shall be paid and from what fund.

It is clear, as has been shown, that if payment of pension is made to Harvey, then payment of the remaining $12.50 could be made to appellant for his services. But the question is not so easily solved if payment to Harvey is not made, as it is not certain that there would be any fund from which the remainder of the fee could then be certified. For it does not follow because Harvey is not entitled to a share of pension that Lydia E., the other claimant, is entitled to the pension which Harvey would have received had he filed his claim for pension prior to July 1, 1880. There is as much doubt as to whether such share would be paid at all as there is doubt that it will be paid to Harvey. So there would be no fund from which the remaining $12.50 could be paid in the event that the claimant Harvey is denied pension, as all the pension due the claimant Lydia E. has possibly been paid to her on the issue of April 4, 1901.

The rule as to the time of payment of a fee in a claim is that payment shall be made out of the first allowance of pension. This rule has always been observed in claims for minors' pensions, and the fee paid when the pension was paid, the share of the fee each claimant was to bear being paid from his share of the pension. The fact that there have been in many instances temporary delays in payment of pension to the respective claimants has never constituted any exception to the rule, and so far as can be learned has not been the subject of complaint by attorneys. No reason presents itself why the rule should not be observed in this case and in other claims belonging to its class, and the entire fee be paid from the first allowance of pension paid to any of the claimants. Then, in the event that in the claim further payment of pension is made to another claimant whose title to pension at the time the first payment was made was not approved, his share of the fee can be deducted and paid to the person or persons from whose share or shares it was deducted at the time the first payment was made. In this way all purposes of the case will be served and all danger will be obviated as to there being no fund from which payment of fee can be made. No reason appears for laying down any other rule for the payment of fees in this class of claims than has been heretofore observed in all claims for a minor's pension.

The argument of the appellant is not in point, as no attempt was made to scale or reduce the fee.

Accordingly, the action of the Bureau is reversed, with direction that the claimant Lydia E. be called upon to refund the sum of $12.50 as overpayment to her at this date, to be paid to the appellant for his services in the claim.

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DECREE—DEFAULT. DIVORCE—INTERLOCUTORY DECREE.

ADALINE LONG (ALLEGED WIDOW).

Under the civil practice of Missouri an interlocutory decree of default in a divorce case, no trial being had nor decree entered upon the merits of the case, is not a decree dissolving the bonds of matrimony existing between a plaintiff and defendant, notwithstanding such decree states that said bonds are dissolved, "and that unless the defendant appear at the next regular term" and "show good cause to the contrary, judgment will be finally rendered." * * *

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

Adaline Long, as widow of Henry Long, who served as a private in Company C, Forty-first Missouri Volunteer Infantry, from August 22, 1864, to May 23, 1865, on April 7, 1896, filed a claim for pension under the third section of the act of June 27, 1890, which claim was rejected April 3, 1899, on the ground—

that claimant is not the legal widow of the soldier, it appearing from the evidence that at the time when soldier went through a ceremony of marriage with claimant he had living and undivorced a former wife, Sarah, from whom he was never effectually divorced.

From this action claimant, by her attorney, appealed April 4, 1899, stating that on September 5, 1872, soldier obtained a decree nisi of divorce from his first wife and thereafter married claimant; that the first wife failed to show cause why the decree should not become final, and that no final decree was entered, and contending that where no cause is shown to the contrary within the time specified the decree nisi becomes absolute and the entry of the final decree is a mere formality.

The decree referred to in this case is as follows:

SEPTEMBER TERM, 1872.

STATE OF MISSOURI,
County of Pulaski, ss:

In the circuit court of said county, on the 5th day of September, 1872, the following, among other proceedings, were held, viz:

HENRY LONG
v.
SARAH LONG. } Divorce.

Now, at this day, comes the plaintiff by counsel, and the defendant, though thrice solemnly called, comes not, but makes default; and it appearing to the satisfaction of the court that the defendant has been personally served with process for more than fifteen days before the first day of the present term of this court,

It is therefore considered by the court that the bonds of matrimony heretofore contracted between plaintiff and defendant be, and the same are hereby, dissolved, and that unless the defendant appear at the next regular term of this court and on or before the end of the third day thereof and show good cause to the contrary judgment will be finally rendered and this cause continued.

No other or final decree was ever entered, as appears from the certificate of the clerk of said court.

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By section 4501 of the Revised Statutes of Missouri the circuit courts have jurisdiction in all cases of divorce, and the like process and proceedings shall be had in such causes as are had in other civil suits, except the answer of the defendant shall not be under oath.

The Code of Civil Procedure of Missouri provides as follows:

SEC. 2013. *Suits, how instituted.*—Suits may be instituted in courts of record, except when the statute law of this State otherwise provides, either, first, by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action and the remedy sought, and by the voluntary appearance of the adverse party thereto, or, second, by filing such petition in such office and suing out thereon a writ of summons against the person or of attachment against the property of the defendant. The filing of a petition in a court of record, or a statement or account before a court not of record, and suing out of process therein, shall be taken and deemed the commencement of a suit. (R. S., 1879, 3485*a*.)

SEC. 2014. *Writs, when returnable.*—Every such original writ shall be dated on the day it is issued and made returnable on the first day of the next term thereafter; but if the first day of such term be within fifteen days thereafter, then such writ be made returnable on the first day of the second term, and such writ when issued shall, together with a copy of the petition, be delivered to the officer charged with the execution thereof. (R. S. 1879, 3486*b*.)

Section 2209 of said code provides that—

If the defendant shall fail to file his answer or other pleading within the time prescribed by law or the rules of practice of the court and serve a copy thereof upon the adverse party or his attorney when the same is required, an interlocutory judgment shall be given against him by default.

Section 2210 provides that—

Such judgment (interlocutory) may, for good cause shown, be set aside at any time before the damages are assessed or final judgment rendered, upon such terms as shall be just.

From an inspection of the decree referred to it will be seen that it was not a final but an interlocutory decree of default only.

While the decree states "that the bonds of matrimony heretofore contracted between plaintiff and defendant be, and the same are hereby, dissolved" * * * unless, etc., it is clearly not a decree of divorce, because it does not show that any trial of the issue raised by the bill for divorce was ever had, and there was nothing at the time before the court upon which judgment could be pronounced, except that the defendant had failed to appear or plead to the bill; that is, she was in default. A decree of divorce could not be rendered until proof had been submitted substantiating the material allegations contained in the bill; that is, that facts were proved showing that under the laws of Missouri the plaintiff was entitled to be released from the bonds of matrimony. The fact that the defendant defaulted by failing to appear and answer after being duly summoned to do so does not show that the statutory grounds of divorce were shown. As appears from the copy of the decree above set forth, the case was continued, it being the practice in the State in Missouri upon taking a default to

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continue the case until the next term for trial and final decree, no trial of the cause being had at the same term at which the default was taken.

As the record now stands no trial was ever had, and no decree dissolving the bonds of matrimony was or could be rendered, and as claimant's marriage to soldier occurred seven days after the interlocutory decree of default was rendered, and before soldier had been divorced from his wife Sarah, the same was void and of no effect, and under the evidence in the case she is not the widow of said soldier.

Your action rejecting claimant's application for pension on the ground stated was not error, and the same is affirmed.

EVIDENCE—PRESUMPTION OF DEATH—ACCRUED PENSION.

MARY J. SCHRATER (WIDOW).

The date of the soldier's death being material in a claim by an alleged widow for his accrued pension, it must be satisfactorily established by distinct proof, and may not be established by general presumption merely, under the rule as to presumption of death from seven years' unexplained absence. (Davie *v.* Briggs, 97 U. S., 628.)

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

This appellant, Mary J. Schrater, in February, 1899, was allowed pension, certificate No. 474393, under the act of June 27, 1890, as widow of Nicholas J. Schrater, who was a member of Company F, Second New York Heavy Artillery, from March 21, 1864, to July 1, 1865, and, having disappeared from his home June 5, 1889, without again being heard of, was presumed, under appellant's claim filed June 1, 1897, to have died, and said claim allowed accordingly.

At the time of his disappearance the soldier was pensioned (certificate No. 166229) at $4 per month on account of disability from gunshot wound of left foot and little finger of left hand, and last drew his pension by check dated June 11, 1889, to June 4, 1889, date of execution of voucher.

Appellant's claim for his accrued pension was rejected in February, 1899, on the ground that no date of death of the soldier could be fixed for the termination of his accrued pension; and on March 15, 1899, she appealed, contending that his death "is presumed to date from the time of his absence, continued and unexplained."

If this contention be sustained it would result in payment of but one day's pension, as the soldier was paid to June 4, and disappeared June 5, 1889.

It can not, however, be presumed that the soldier died June 5, 1889.

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Such is not the force in law of the presumption of death of a party. The law is that—

the person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death.

This is the general rule of law, as held in Davie *v.* Briggs (97 U. S., 628), and has been held by the Department in a number of cases to have received, for pensionable purposes, a legislative restatement by the act of March 13, 1896, and to be, therefore, in force in pension adjudications; said act reading as follows:

That in considering claims filed under the pension laws, the death of an enlisted man or officer shall be considered as sufficiently proved if satisfactory evidence is produced establishing the fact of the continued and unexplained absence of such enlisted man or officer from his home and family for a period of seven years, during which period no intelligence of his existence shall have been received.

It is further stated in the case of Davie *v.* Briggs to be the law that this presumption relates only to the fact and not to the time of death, and that when the latter fact is material to the issue in any case it must be proven; and quotes, as the leading English case on this point, Nepean *v.* Doe (dem. Knight, 2 M. & W., 894), as follows:

We adopt the doctrine of the court of King's Bench that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

And the court, in Davie *v.* Briggs, adds: "To the same effect are Mr. Greenleaf and the preponderance of authority in this country," citing 1 Greenl. Ev., sec. 41, and many American decisions.

In Stephens's Digest of Evidence, art. 99, also, the rule is stated that—

There is no presumption as to the time when he (the person presumed dead) died, and the burden of proving his death at any particular time is upon the person who asserts it.

In the case of Nepean *v.* Doe, supra, the court stated further that—

Inconveniences may no doubt arise, but they do not warrant us in laying down a rule that a party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances.

And also, in Spencer *v.* Moore (11 Ired., N. C., 160), the court stated:

The presumption does not extend to the death having occurred at the end or any other particular time within that period (seven years), and leaves it to be judged of as a matter of fact according to the circumstances which may tend to satisfy the mind that it was at an earlier or later day.

This doctrine was reaffirmed in Spencer *v.* Roper (13 Ired., 333), and is unquestionably the present law of the American as well as of the English courts.

Following the settled law on this subject, therefore, it must be held

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herein that rejection of the appealed claim for accrued pension was proper, the evidence in the case wholly failing to establish any date of death of the soldier, who is merely shown to have never been heard of since June 5, 1889, when he left his home in New York ostensibly for the West, intending to take up Government land in Montana or California.

Rejection of claim is affirmed accordingly.

AID AND ATTENDANCE—ACT JULY 14, 1892—EVIDENCE—EXAMINING SURGEONS—INCREASE—COMMENCEMENT.

JOHN BLAISDELL.

1. The disability on account of which pension was granted, resulting from epilepsy, manifested by a clonic spasm of the extremities, occurring but two or three times a year, is not deemed to exist in such a degree as to require frequent and periodical personal aid and attendance of another person.
2. Increase to $50 per month under the act of July 14, 1892, can only commence from the date of the certificate of the examining surgeons showing such degree of disability made subsequent to the passage of said act.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

John Blaisdell, formerly a corporal in Company C, Third Michigan Volunteer Cavalry, appealed, March 22, 1899, through his attorney, from the action of the Bureau of February 18, 1899, rejecting his claim for increase filed May 20, 1897, on the ground that the rate of pension he was then receiving, $30 per month, second grade, was fully commensurate with the degree of disability resulting from "nervous prostration (epilepsy)," cause for which he was pensioned.

In his declaration for increase he alleged that his condition was such that he required the frequent and periodical aid and attendance of another person, and was therefore entitled to $50 per month as provided by the act of Congress approved July 14, 1892, and it is contended in his appeal that an affidavit of Dr. M. C. Cronin, filed in support of the claim for increase, shows that he, by reason of the cause for which he was pensioned, required the aid claimed.

The medical referee, in a slip accompanying the papers on appeal, and under date of June 4, 1901, states:

> The pensioner's principal disability now appears to be due to senility and other causes independent of the nervous prostration (epilepsy) for which he is pensioned.

The pensioner was examined under his claim May 18, 1898, by the board of surgeons at Hartford, Mich., which reported his condition to be as follows:

> Pulse rate, 140; respiration, 30; temperature, normal; height, 5 feet 9 inches; weight, 180 pounds; age, 79 years.
>
> Claimant fleshy, muscles soft, hands cold and clammy; skin mottled and cyanotic; tongue furred; teeth all gone; eyes dull, conjunctivæ red; enlargement of isthmus

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of thyroid large as hen's egg; very nervous, with marked muscular tremor; cries at the least mention of his trouble; lungs weak and oedematous; heart action rapid, weak, and intermittent; apex 1 inch high; area double in size; heart sounds faint but no murmur; fatty heart.

Reflexes feeble, hands, arms, and lower extremities numb and cold. Had stroke of paralysis one year ago of right side; right eye totally blind, can not distinguish light from dark; left eye, vision twenty one hundred and sixtieths.

Has epileptiform attacks two or three times a year; does not lose consciousness entirely, but self control.

Has to have assistance in dressing and undressing.

This claimant is so disabled from his disabilities as to be incapacitated for the performing of manual labor and is entitled to $30 per month.

This certificate is descriptive of a very old and feeble man, manifesting the usual symptoms of senile degeneration. He was suffering with fatty (dilated) heart and consequent œdema of lungs, a serious and incurable condition.

The nervous prostration for which he was pensioned was, by the medical action which fixed his present rate of $30 per month, determined to be epilepsy. This "epilepsy" was shown to be manifested by a clonic spasm of the extremities. There were no other signs of disease of nervous system shown by the evidence. The board making this last examination certify that he had epileptiform attacks two or three times a year. This infrequency of the spasms would not make it necessary for him to have the frequent and periodical personal aid and attendance of another person; hence if aid and attendance were rendered it was because of his other diseases, and senility. It is noted that the board recommended the rate he was then receiving.

Dr. Cronin's affidavit, referred to in the appeal, appears to have been based upon a physical examination of the soldier, hence has not as much weight as the certificate made by three physicians based on a like physical examination. Furthermore, pensioner's title to the intermediate rate of $50 per month provided by the act of Congress approved July 14, 1892, must be established by the certificate of medical examination made after the passage of the act, as indicated by the following language used in said act:

That soldiers and sailors who are shown to be totally incapacitated for performing manual labor by reason of injuries received or disease contracted in the service of the United States, and in line of duty, and who are thereby disabled to such a degree as to require frequent and periodical, though not regular and constant, personal aid and attendance of another person, shall be entitled to receive a pension of fifty dollars per month from and after the date of *the certificate of the examining surgeons or board of examining surgeons showing such degree of disability*, and made subsequent to the passage of this act.

The intention of Congress that the findings of a board of examining surgeons should determine title to the said rate is further indicated by the House report on the bill, which says, among other things—

The only objections which can be urged against this bill are, first, that it may possibly be liable to abuse, whereby applicants for increase may by ex parte testimony

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undertake to establish the fact that their degree of disability is such as to require frequent and periodical aid and attendance of another person, when in fact they are not so greatly disabled. It is clear that the act fixing the $30 and $72 rate are at least equally open to this objection, and in this bill it is sought to reduce this danger to a minimum by the provision that the increased rate shall date from the date of report of board of examining surgeons showing such degree of disability. Under this provision the findings of the board of surgeons is given precedence, and may be supplemented, of course, but not controverted or negatived, by ex parte testimony.

As before stated, the certificate of medical examination does not describe a condition resulting from nervous prostration (epilepsy) which made it necessary for the soldier to have the frequent and periodical aid and attendance of another person, hence the action rejecting the claim was fully warranted, and is hereby affirmed.

DISABILITY—RATE—ACT JUNE 27, 1890—ŒDEMA.

LEE K. JANNEY.

Appellant's disability, resulting from disease of left foot and leg, evidenced by marked swelling of entire left lower extremity in marked contrast with its fellow, simulating elephantiasis, due to local œdema, right thigh measuring 17 inches, left 18¼ inches; right lower thigh 15 inches, left 16 inches; knees 15 inches; right calf 12, and left 17 inches; right ankle 9 inches, left 15; right arch of foot 8½, and left 10 inches, existing in a degree rendering him unable to earn a support, he was entitled to a rate of $12 per month from October 26, 1899, and action is reversed.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

This appellant, Lee K. Janney, formerly a private in Company H, One hundred and forty-sixth Ohio National Guards Infantry, while in receipt of a pension at the rate of $6 per month under the act of June 27, 1890, on account of partial inability to earn a support by manual labor, filed January 25, 1897 (Certificate No. 912564), a claim for increase, which was rejected March 13, 1899, on the ground that the rate of pension he was then receiving was commensurate with the degree of his inability to earn a support by manual labor. The cause of pensioner's partial inability to earn a support by manual labor was accepted to be a disease of left foot and leg.

From the action rejecting the claim for increase the pensioner, through the recognized attorneys in the case, filed June 26, 1899, an appeal, contending in effect that the disease of his leg had become so much worse that he could not walk without the aid of a cane; that the swelling of leg below the knee was so great that there is danger of rupturing the skin when the weight of the body is brought upon said leg.

With the appeal were filed photographs of the pensioner, together with an affidavit of Dr. Henry Myer showing the condition of the soldier as revealed by a physical examination. (See plates 1 and 2.)

Upon the same date of filing this appeal (June 26, 1899) he filed another claim for increase which, on July 17, 1900, was also rejected on the same grounds as the former claim for increase.

There was received in the Department August 28, 1900, a communication from the attorneys in the case expressing a desire to amend the pending appeal and stating that the claimant filed with his last claim for increase (June 26, 1899) medical evidence showing that on account of the swollen condition of his leg he is wholly disabled for all kinds of labor or for business; that the leg was twice its normal size; that owing to the condition of the leg the skin is in danger of rupturing if he bend or move it; that the leg is enlarged from foot to hip, and "the flesh and skin are like a solid marble cast."

The communication closes with the statement that the evidence filed must have been passed without the careful examination it required, and that "the Commissioner erred in rejecting his claim the 17th day of July, 1900."

This communication will be treated as an appeal from the action rejecting the claim last filed.

The following is a copy of an opinion of the medical referee under date of August 6, 1901, which accompanied the papers on appeal:

This claimant's attorneys have appealed from the medical actions of February 8, 1899, and June 27, 1900. The disease of left foot and leg, for which he was pensioned, appears to be simply a case of lymph œdema, and it is not an inflammatory disorder, nor is it necessarily a painful condition. The measurements given in the reports of examination made in 1896, 1897, and 1898, show as follows: In 1896 the left knee was three-fourths inch and the left calf 2 inches larger than the right. In 1897 the left calf was found 2 inches larger than the right. In 1899 the knees measured each 15 inches, and the left calf was 5 inches larger than the right. There was, therefore, an increase of 3 inches difference between the calves of the legs from 1897 to 1899. The claimant had in 1899 attained to the age of 65 years and presented some evidences of senile debility. It is my opinion that the rejection of increase on February 8, 1899, was proper, but that increase to $8 a month should have been allowed from October 26, 1899. If the case is resubmitted, increase to $8 a month will be allowed from October 26, 1899, for "disease of left foot and leg and senility."

The certificate of medical examination of May 12, 1897, on which the action of March 13, 1899, was based, reads as follows:

Pulse rate, 72; respiration, 18; temperature, 98½; height, 5 feet 9½ inches; weight, 145 pounds; age, 63 years.

General appearance good; body well nourished. Skin and eyes bile-tinged and tongue yellow coated. Left leg œdematous from knee to ankle. At left ankle 4 inches larger around than right, and at calf 2 inches larger; skin of whole leg healthy and clean and no evidence of cause of swelling. No œdema of any other part of body. Rating, six-eighteenths for disease of left leg. No disease of left foot. No evidence whatever of disease of heart, vertigo, piles, rheumatism, or general breaking down of system. No disability in either case. No rating. No evidence of dropsy except that of left leg rated above.

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LEE K. JANNEY (CERTIFICATE NO. 912564).

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No evidence of disease of liver, kidneys, or urinary organs. Urine straw color. Specific gravity, 1020; acid, no albumen, no sugar. No disability, no rating.

Claimant is evidently troubled with indigestion and faulty assimilation, with torpid liver, with all reflex sensations. Rating four-eighteenths for indigestion and results. No evidence of vicious habits.

This examination showed the pensioner to be of good genera appearance, body well nourished and free from all evidences of disease other than the swollen left leg. The board expresses the opinion that he is troubled with indigestion. This opinion appears to have been based upon the pensioner's complaints, as no symptoms of indigestion are described in the certificate.

The only incapacitating condition shown is the diseased leg. The swelling was at time of examination limited to the leg; that is, from knee to ankle. The thigh and foot were not then involved. The skin over the whole leg was "healthy and clean." It was not shown that the leg was painful, and the character of the disease makes it probable that the part was not painful.

In view of these facts the Department concludes that the rate of pension, $6 per month, the soldier was then receiving was adequate, and the action of March 13, 1899, rejecting the claim for increase filed January 25, 1897, is affirmed.

The soldier was examined October 26, 1899, under the claim filed June 26, 1899, when his condition was reported to be as follows:

Pulse rate, 80–84–90; respiration, 17–19–24; temperature, 98.6; height, 5 feet 9½ inches; actual weight, 148 pounds; age, 65 years.

Disease of left foot and leg: There is marked swelling of entire left lower extremity in marked contrast with its fellow, simulating elephantiasis, due to local œdema, the connective tissue being the only structure involved. No disease of muscles or bones. This is due to some local vascular trouble, probably athromatous, in popliteal or femoral vein. Right thigh measured 17 inches; left, 18¼ inches; right lower thigh, 15 inches; left, 16 inches; right knee, 15 inches; left, 15 inches; right calf, 12 inches; left, 17 inches; right ankle, 9 inches; left, 15 inches; right arch of foot, 8½ inches; left, 10 inches. This condition causes lameness. Disease of left leg, enlargement, and swelling of leg. Rate, eight-eighteenths.

Disease of liver: Liver measures 5 inches mammary line, no nodules, no jaundice; 3 or 4 chloasma spots on face; tongue and teeth fair. No rate.

Kidney disease: Urinalysis, specific gravity, 1020; acid, yellow. No sugar, no albumen. No rate.

Disease of eyes: Conjunctivitis of both eyes; reaction normal; arcus senilis both eyes well marked; fringe is most marked on lower border of cornea; sees with either eye twenty forty-fifths. Rate two-eighteenths.

Indigestion: Teeth fair, tongue coated, face pale, emaciated, distention of abdomen by gases. Vegetative functions not well performed. Claimant is anæmic. No evidence of vicious habits. No other disability.

It was upon the showing in this certificate of medical examination that the adverse action of July 17, 1900, was based. The medical referee is of the opinion that increase to $8 per month should have been allowed from the date of this last medical examination.

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While it is probable that the photographs of the pensioner, which were filed with the first appeal, June 26, 1899, were not before the medical division at date of the rejection of claim for increase, filed June 26, 1899, they were doubtless considered when the opinion of the medical referee was prepared.

It is believed by the Department that the photographs referred to and the description of the soldier in the last certificate of examination show that his condition is such that he can not earn any part of his support by manual labor.

The leg from groin to toes appears to be invaded by the disease. It is doubtless true, as stated by the medical referee, that it "is not an inflammatory disorder, nor is it necessarily painful," yet the leg is greatly enlarged, hard and tense, and the risk assumed in any attempt to do manual labor would indeed be great.

For these reasons it is concluded that the proposed rate of $8 per month is inadequate, and that the maximum rate of $12 per month should be allowed from the date of the last certificate of medical examination, October 26, 1899. For this purpose the action of July 17, 1900, is reversed.

FEE AGREEMENTS—INCREASE—ACTS OF JUNE 27, 1890, AND MARCH 3, 1891.

JOHN H. AFFLERBACH (CLAIMANT).
LEWIS HEININGER (ATTORNEY).

The fee in a claim for increase under the act of June 27, 1890, regardless of the cause upon which said claim is based, is governed by the fourth proviso of the pension appropriation act of March 3, 1891, and can not exceed $2.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

Lewis Heininger, of Washington, D. C., on July 16, 1901, entered an appeal from the action of the Bureau in the matter of fee on the issue of February 6, 1901, in the claim for increase of pension under the act of June 27, 1890, of John H. Afflerbach, who served in Company C, One Hundred and Seventy-fourth Pennsylvania Drafted Militia.

The soldier was in receipt of pension under the act of June 27, 1890, at the rate of $6 per month on account of partial inability to earn a support by manual labor from disease of digestive organs, when on September 7, 1899, in his behalf, the appellant filed a declaration for increase of pension under said act, in which disease of digestive organs, catarrh of stomach, nervous dyspepsia, liver trouble, and constipation

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were alleged as disabling causes. He filed January 3, 1901, the claimant's affidavit in which disease of heart was alleged as a disabling cause.

A medical examination was held May 16, 1900, from which date certificate issued February 6, 1901, to allow the rate of $10 per month for partial inability to earn a support by manual labor from disease of digestive organs and disease of heart. On said issue Mr. Heininger was certified a fee of $2. On appeal he contends for the allowance of a fee of $10.

It appears that the rate of $10 per month was allowed on account of partial inability to earn a support by manual labor from disease of digestive organs and disease of heart. As has been stated, the rate of $6 per month was allowed on account of partial inability to earn a support from disease of digestive organs.

The appellant argues, in substance, that the approval for the allowance of increase of pension on account of the soldier's inability to earn a support by manual labor from disease of heart in addition to inability from disease of digestive organs is, in effect, an allowance of additional pension on account of disability due to disease of heart, and therefore a fee of $10 should be paid to him for securing additional pension.

The question at issue was decided by the Department in the case, Joseph F. Smith (7 P. D., 11), dated August 13, 1893. It is there held that—

> The fee in a claim for increase of pension under the act of June 27, 1890, regardless of the causes upon which said claim is based, is governed by the fourth proviso to the pension appropriation act of March 3, 1891, and can not exceed $2.

The fourth proviso to the appropriation act of March 3, 1891, provides as follows:

> Hereafter no agent or attorney shall demand, receive, or be allowed any compensation under existing law except two dollars in any claim for increase of pension on account of increase of disability for which pension has been allowed. * * *

The decision in the case of Joseph P. Smith, supra, was followed by the decision of the Department in the case of George Jacobs (7 P. D., 39). The rule laid down in the case of Joseph P. Smith, supra, was approved and the question was further discussed. In every case on appeal to this Department in which was presented for consideration the question as to the amount of fee to be paid in claims for increase under the act of June 27, 1890, filed subsequently to the act of March 3, 1891, the date of the approval of the act reducing the fee in claims for increase to $2, the Department has invariably followed its decision in the case of Joseph P. Smith, supra. In that case, and in the case of George Jacob, the Department considered at length argument similar to that submitted by the appellant in this case. It is not believed that it is necessary to say anything in addition to the views

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which have already been expressed relative to the law applicable to the payment of fees in claims for increase under the act of June 27, 1890.

The appellant states that the decisions of the Department upon the issue in question are contrary to the act of Congress approved May 9, 1900, but fails to point out any conflict and the Department is unable to discover any.

The action of the Bureau in denying the appellant a fee in excess of $2 for securing an increase of pension under the act of June 27, 1890, is in strict accord with the law as construed by this Department and, therefore, is affirmed.

COMMENCEMENT—ACT OF JUNE 27, 1890.

JAMES MCHARRY.

Original invalid pension granted under the provisions of section 2 of the act of June 27, 1890, must commence from the date of filing an application therefor, and the action of the Bureau in commencing the pension in this case from the date of the examining surgeon's certificate of examination was error.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, May 24, 1901.

The claimant, James McHarry, formerly a landsman on the U. S. S. *Galena*, filed on July 28, 1890, an application for pension under the provisions of the act of June 27, 1890, which was rejected by your Bureau October 7, 1891, on the ground that no ratable disability had been shown. On November 9, 1891, claimant filed the testimony of A. E. Coy, M. D., setting forth that he was afflicted as follows:

Muscular rheumatism of the back and hips, for which he has been under my treatment, and unable to attend to business for two weeks at a time. He is lame in the left ankle from an injury received while in the service. Also failure of eyesight (myopia).

Affidavits from some of claimant's neighbors were also filed, setting forth that he was afflicted with rheumatism and an injured ankle.

On December 5, 1891, your Bureau reopened his case for further consideration.

On January 11, 1892, he was medically examined by the board at Chicago, Ill. On November 7, 1892, he was granted a pension at the rate of $8 a month from January 11, 1892 (the date of said medical examination).

On February 18, 1897, claimant filed an application for increase of pension on account of "rheumatism, injury to left ankle, and lumbago, or disease of the kidneys;" and claiming further:

That under the provisions of the act of Congress approved March 6, 1896, he is justly entitled to a reconsideration of his claim; that he was disabled in a pensionable degree at the date of filing his first declaration under the provisions of the act of June 27, 1890; and that under the act of March 6, 1896, his pension should date from the original filing, some time in the year 1890 (July 28), instead of from January 11, 1892.

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On April 25, 1899, your Bureau rejected the claimant's application.

On April 29, 1899, he appealed from said action, contending, first, that he should be allowed the highest rate allowed by the act of June 27, 1890; second, that there should be "a reissue of pension, to cover the time from the date of his first application to the date wnen the pension was made to commence."

These facts were presented for your consideration by this Department on November 23, 1900, and your further attention invited to the fact that the records in the claim disclosed the fact that you had caused appellant's pension to commence on January 11, 1892, the date of a medical examination, instead of on July 28, 1890, the date when he filed his declaration.

The above facts were presented with the request that you report your reasons for such action, stating under what statute or ruling said action was based.

Your attention was also invited to the fact that section 2 of the act of June 27, 1890, provides specifically that pensions thereunder—

Shall commence from the date of filing of the application in the Pension Office.

I have received your report, in which you state that—

The date of commencement from date of medical examination finding a ratable disability was in accordance with the practice at the time, though the medical branch usually fixed the date.

The report of your medical referee, to which you invite my attention, is as follows:

This is an appeal from the rejection of February 16, 1899, of the claim for increase of pension under the act of June 27, 1890, and for the benefit of the act of March 6, 1896, filed February 18, 1897. The claimant is pensioned at $8 a month for rheumatism.

The original application for pension under this act which was filed July 28, 1890, was rejected October 7, 1891. It was subsequently reopened, a new medical examination held, and a pension of $8 a month granted (Order 164), for rheumatism the date of commencement being fixed by the legal branch of the office at January 11, 1892, the date of this new medical examination.

A careful review of all the papers in the case warrants the opinion, first, that a ratable disability under this act, even as it was then construed (Order 164), was not shown prior to January 11, 1892; second, that the rate of $8 is now ample rating for all the permanent disability shown in this case, every cause of disability being considered. The denial of increase and of rerating under the act of March 6, 1896, is, so far as this division is concerned, correct and in accordance with the papers in the case.

The action of February 16, 1899, is therefore adhered to.

It can scarcely be maintained that at the inception of adjudications under this statute it was advisable to place in the hands of your medical force the adjustment of matters wholly legal in character, nor is it understood how, in an original adjudication, the very plain language of the statute—

shall commence from the date of the filing of the application in the Pension Office—

could be overlooked or misconstrued.

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If, as stated, the medical officers of your Bureau "usually fixed the date" (of commencement), this was an erroneous assignment of a legal duty.

But in this particular case it would appear that the medical officers did not fix the date, but that it was established by those whose ordinary duty it would be to fix rates and dates of commencement, although the approval for commencement from date of filing original declaration was canceled and the date of the medical examination was substituted.

Assuredly it may not be charged that the statute is ambiguous or subject to doubt as to its meaning or proper construction.

Nor have I been able to discover that the Department has in any way contributed to this unfortunate construction of the law in question. On the contrary, within a few days over a month after this law received the approval of Congress the then Commissioner of Pensions, upon his own inquiry as to the point in question, was, August 6, 1890, advised by Assistant Secretary Bussey that—

> The Department holds, in accordance with the requirements of the act of June 27, 1890, and with rulings already made construing the same, that the date of pensions, granted under said act, must begin from the date of the filing of a formal application. * * * (Vol. 4 P. D., 140.)

In the claim of Timothy L. Carley (7 P. D., 12), decided August 18, 1893, this ruling was reasserted, as follows, in so far as the direct issue in question is concerned:

> All pensions granted under the second section of the act for disabilities which incapacitate for the performance of manual labor in such a degree as to render the claimant unable to earn a support should commence from the date of filing the application therefor in the Bureau of Pensions, after the passage of said act, upon proof that a pensionable disability existed at the time such application was filed.

This ruling was reaffirmed in the claim of Alexander Eastman, November 7, 1896 (8 P. D., 358), and in the claim of Galen Peters, August 3, 1897 (9 P. D., 102); again, February 17, 1898, in the claim of Rollin Lewis (9 P. D., 216); also, December 31, 1898, in the claim of Preston M. Rohn (10 P. D., 72).

Thus it will be observed the printed decisions and instructions of the Department upon this issue present an unbroken line of direct, specific, and harmonious directions.

This claim was adjudicated in November, 1892, subsequent to the reception in your Bureau of well-defined directions upon the exact point in issue, and in direct conflict therewith. The Department never possessed authority to modify or direct, or to consent to modification or change by the Bureau of the plain and unqualified provisions of the law.

If it was the judgment of the Bureau that, under the original claim, the proof disclosed no pensionable conditions under the statute, no issue should have been made. The claim should have been rejected.

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The action as to date of commencement was clearly error and without authority of law.

October 29, 1891, the claimant executed an affidavit which was filed in your Bureau, November 9, 1891, reciting that—

He is applicant No. 20470 for pension, act 27 June, 1890. He feels that great injustice has been done him in the rejection of his claim by the doctors. The condition of his eyes is such as to disqualify him for any work at any time by gaslight, or any other than sunlight. He is entirely disabled for any occupation involving ordinary manual labor, on account of pain in back, disease of kidneys, and injury to left ankle, causing him to be lame. That even in his light work as a barber he suffers more or less all the time from weakness and pain in the region of the kidneys. So in the past year he has been entirely laid up repeatedly for a week or ten days at a time, and much of the time when trying to work must quit from one to three hours before end of day on account of these pains. He prays his case may be reconsidered.

On the 27th day of March, 1901, this Department reviewed the rejected pension claim of John A. Martin, late of Company D, First Battalion Pennsylvania Volunteer Infantry, under docket numbered 50873. This also was a claim under the acts of June 27, 1890, and March 6, 1896.

This decision is found in P. L. Book No. 413, and discloses the following facts and finding:

Soldier filed his first declaration for pension September 16, 1890, in which causes for disability were alleged which were not found to exist by medical examination made under the claim. Subsequently he filed an affidavit in which additional disabilities were alleged. A medical examination revealed a pensionable condition and pension was made to begin from the date of said affidavit, which met all the requirements of a valid declaration.

Held: That no error was made by such adjudication, as the evidence in the case failed to show a pensionable condition prior to the date of filing the affidavit, June 9, 1892.

The affidavit in the case at bar, filed in the Bureau November 9, 1891, may properly be treated as a declaration for pension, and it is accepted as such. It remains to be ascertained whether or not on that date this claimant was ratably disabled, as provided by the act in question.

One month after the filing of this paper the Bureau directed a medical examination under very careful instructions by its medical officers.

This examination was held a month later, January 11, 1892, the claimant stating to the surgeons that—

He makes the following statement upon which he bases his claim for original (pension): Left ankle was injured by recoil of gun on U. S. S. *Galena* at Fort Morgan, Mobile Bay, August 5, 1864, and has been lame ever since. Is subject to lumbago; pain in small of back and hips—at times unable to stand erect. Sight has been gradually failing for last five years. Is a barber by occupation; frequently is unable to work.

Thereupon the board of surgeons proceeded to examine the claimant, stating as follows:

Upon examination we find the following objective conditions: Pulse rate, 84; respiration, 18; temperature, 98.2; height, 5 feet 4 inches; weight, 178 pounds; age,

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50 years. No visible evidence of injury to left ankle—no enlargement, no deformity. Both ankles same measurement—over malleoli, 10½ inches; over instep, 9½ inches. There is chronic inflammation of tarsal joint, no pain on manipulation or jarring; limps in locomotion. On injury to left ankle six-eighteenths. Kidneys are normal; urine acid, sp. gr. 1012; color, pale straw; abnormal; no sugar by Haines's test; no albumen by heat and nitric acid. On kidney disease no eighteenths. Sight is normal for age—both eyes, twenty-sixtieths hyperopic astigmatism, corrected by glasses to twenty-twentieths. Disease of eyes no eighteenths. Both shoulders and left elbow decidedly crepitant and painful on manipulation; also pain on bending of body or hips. Heart normal. Rheumatism eight-eighteenths. No other disability found.

On the same date and subsequent to the filing of the affidavit of November 9, 1891, claimant filed the testimony of several friends and neighbors indicating an impairment in his ability to earn a support by manual labor, from causes stated and found by the surgeons.

It is believed this claimant was entitled to the minimum rating from the date of filing his declaration, November 9, 1891, and the papers in the claim are herewith returned for readjudication in accordance with this view.

Title to a rating from an earlier date is not shown.

In April, 1891, when first medically examined, soldier was 50 years of age, 5 feet 2 inches in height, weighed 162 pounds. Little evidence of disability from any of the causes alleged was found. Soldier was rated two-eighteenths for lumbago.

The medical examination of November, 1898, discloses no material change in soldier's condition. He is clearly not entitled to increase.

Your action in the premises, save as to date of commencement, is affirmed.

FEE—FEE AGREEMENTS—DEPENDENT PARENT'S CLAIMS—SECTION 4707, REVISED STATUTES, AND ACT OF JUNE 27, 1890.

MARY HORAN, MOTHER (CLAIMANT).
JAMES F. RUSLING (ATTORNEY).

Under the fourth section of the act of June 27, 1890, fee of but $10 can be paid an attorney for services in a claim filed under any of the provisions of said act; and the question as to whether a dependent parent's claim was properly granted under the provisions of section 1 of said act can not be decided upon appeal as to a question of fee, but the remedy must be sought in an application to the Commissioner of Pensions for a readjudication of a claim and a reissue under the general law as it existed prior to the passage of the first section of the act of June 27, 1890.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions August 31, 1901.

James F. Rusling, of Trenton, N. J., on July 25, 1901, filed a motion to reconsider the decision of the Department of July 16, 1901, affirming the action of the Bureau in denying him a fee in excess of

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$10 upon issue to allow a dependent parent's pension under the act of June 27, 1890, in the above-entitled case.

Certificate issued August 14, 1900, in the claim to allow pension to Mary Horan as dependent mother of John Horan, under the provisions of the first section of the act of June 27, 1890. On said issue a fee of $10 was certified to the appellant. He contended for a fee of $25 under articles of agreement. The action of the Bureau was affirmed upon the ground that a fee in excess of $10 can not be certified to an attorney for his services in securing an allowance of pension under the act of June 27, 1890.

In this motion as upon appeal, Mr. Rusling argues that pension should have been allowed under the provisions of the general law. Such contention is not in point. The fact is that pension has been allowed under the provisions of the act of June 27, 1890. Whether right or wrong the action of the Bureau in allowing pension under the act of June 27, 1900, can not be reviewed, as said question relates solely to the merits of the claim for pension. The action of the Bureau in a claim upon its merits can not be reviewed upon appeal from its action in the matter of fee.

The appellant complains that the proper fee has not been certified to him. For the purpose of supporting his contention for a greater fee than has been certified to him, he declares that pension in this case should have been allowed pursuant to some law other than that under which the claim was approved; but he has taken no steps looking to the correction of the error which he asserts has been committed. He permits the supposed error to remain uncorrected and takes steps looking to the payment of a fee for services in such claim as he believes should have been allowed by the Bureau.

The rule is, and in conformity therewith this Department has invariably held, that only such fee shall be paid as the law directs for such pension as has been secured by an attorney for a claimant.

In this case pension has been secured by the appellant under the provisions of the first section of the act of June 27, 1890. One of the plain mandates contained in section 4 of said act is that a fee in excess of $10 can not be paid for prosecuting a claim for pension under the provisions of the act of June 27, 1890. Therefore a fee in excess of $10 can not be paid for services in a claim under said act. (See case of Sarah O. Stockwell, 10 P. D., 428.)

No error is found in the decision of the Department; therefore this motion is overruled.

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INCURRENCE—LINE OF DUTY—EVIDENCE—PRESUMPTION.

FRANCIS BALTZER.

The prior soundness of the claimant being well established and it being shown that he performed active duty of the most arduous character, immediately following which he was taken sick with a congestive chill and sent to hospital, where after three months' treatment he was discharged the service on account of inguinal hernia and synovitis of the knee joint, and there being no intimation that he was at any time outside the line of duty, it will be presumed that his alleged double hernia was the result of his military service in line of duty.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions. August 31, 1901.

Francis Baltzer, late of Company E, Eighty-fourth Illinois Infantry, is a pensioner under the act of June 27, 1890, at $12 per month, on account of disability arising from double inguinal hernia (complete and complicated), disease of rectum, and rheumatism. Previous to the allowance of that pension he had filed, March 5, 1878, a claim under the general law, in which he alleges that at Camp Smith, near Nashville, Tenn., about December 26, 1862, he was taken with a congestive chill and became paralyzed, caused by cold and exposure. When partially convalescent and while in hospital, he was taken with severe pains in his abdomen, and when the surgeons examined him he was pronounced to be badly ruptured, and the opinion was expressed that the same was caused by overexertion and carrying too much weight upon his person. In another statement, filed July 11, 1881, claimant alleged that it was in the latter part of December, 1862, he was taken with a congestive chill and severe vomiting, and became so paralyzed as to be wholly unable to move any portion of his body except his tongue and eyes; that he had severe pains in his abdomen, and after examination by a surgeon was pronounced to be ruptured. Still another statement, filed January 30, 1891, is substantially to the same effect as regards the rupture, and shows in addition that claimant's knees swelled to a great size from inflammatory rheumatism.

Claimant was discharged the service on a surgeon's certificate of disability on account of "inguinal hernia and chronic synovitis of the knee joint." A special examination of the claim was held, after which it was rejected May 26, 1884, on the ground that—

The record fails to show that the hernia mentioned therein was incurred in service and line of duty; claimant's means of obtaining information have been exhausted without proving his title to pension. Some of the testimony obtained tends to show that the hernia existed prior to enlistment, none of it shows when or where the ruptures were incurred, discrepant stories are told as to origin, attributed to claimant, and no satisfactory testimony shows existence of a double hernia at the date of discharge or in the service.

Some additional evidence was filed which was held not to change the

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status of the claim, and an appeal was taken June 26, 1897. In the consideration of that appeal September 25, 1897, it was pointed out that while the evidence was far from explicit and failed to show the time and manner of the incurrence of alleged hernia by the soldier, yet there was nothing adverse to his allegations as to the circumstances under which he first discovered that he was ruptured. It was further shown that the special examination was deficient in that it did not secure a full history of the claimant while in the service, and it was directed that the claim should be reopened for the purpose of holding a further special examination. This was done in 1898, and as a result the claim was again rejected November 28, 1898, on the ground that the evidence failed to establish origin of the alleged hernia in line of duty.

The soldier was enlisted August 8, 1862, and was discharged for disability, as stated, March 10, 1863. The records show that he entered general hospital No. 2, Nashville, Tenn., December 7, 1862, and was treated therein until his discharge from service in March, 1863. The certificate of disability merely recites the nature of his disability at the time of his discharge, namely, "inguinal hernia and chronic synovitis of the knee joint." As already seen, the claimant alleged that he was taken sick December 26, 1862, whereas the record shows that he was in hospital as early as December 7, 1862. This discrepancy has not been explained, but the claimant's allegation as to the manner in which he was taken sick seems to be well sustained by the testimony of comrades. That is, it is testified that he was taken with a congestive chill and was sent immediately to hospital, and a number afterward heard that he suffered from a rupture or hernia. Only one or two, however, appear to have known of the disability from having seen it up to the time of his discharge from the service. Dr. Joseph H. Green has testified as follows:

I was a ward surgeon in hospitals Nos. 2 and 3, Nashville, Tenn., from March, 1862, to September, 1865; that sometime in November or December, 1862, this soldier came under my treatment in said hospital for congestive chills, with temporary paralysis following. He was also suffering from a double inguinal hernia, which no truss in the hospital would retain. He remained in hospital No. 2 until discharged from the service, March, 1863.

The difficulty in this case is not that the claimant did not have the disabilities alleged, but that the exact cause of the hernia, or double hernia, is not shown. Dr. Green does not sustain the claimant's statement that the hernia was probably produced by a severe spell of vomiting. Furthermore, his testimony indicates that the double hernia already existed when claimant entered the hospital. The determination of the case depends, therefore, upon whether the circumstances of the soldier's service will justify the presumption that the disability grew out of or was produced by his arduous duties as a soldier, as alleged

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by him. There is no doubt that the ground of rejection, as hereinbefore quoted, is technically correct, but certain facts are shown which go far to indicate that the claimant is probably justified in his allegations.

In the first place, it may be stated that the intimation of the existence of the hernia previous to enlistment is abundantly disproved by the testimony secured in the last special examination of persons who were intimately associated with him and who had seen him in a nude state while swimming and otherwise for several years before he enlisted. In the next place, it is equally well proven that the march of the regiment from Louisville, Ky., to Nashville, Tenn., in October and November, 1862, was extremely long and severe, and the men were subjected to many hardships, as declared by the claimant. It is shown that during this march the men carried heavy weights in the way of extra clothing and accouterments; that some days they had to march and countermarch long distances; that they were frequently compelled to lift and remove large trees and other obstructions which the enemy had placed across the road; that they were forced to cross streams and climb mountains, and that the whole route was one of constant strain and endurance. Whether the claimant incurred his disability by reason of this service can not be known. It is very certain that just after arrival in Nashville he had the attack which necessitated his going to hospital. It is further true that during all this period the claimant is shown to have been as active and diligent in the performance of his duties as any of his comrades and there is no intimation that he was out of line of duty for even the shortest time.

It is well understood that in the matter of disabilities of the character of the one alleged it is desirable to have proof of the exact time, place, and circumstances of incurrence. It would seem, too, that a person so afflicted would be able to tell just when he incurred the disability, and yet it is a remarkable fact, as regards this particular disability, that many persons have suffered from it not knowing that they had it, or at least the nature of the same, until informed by a physician, just as this claimant alleges was the fact in his case. It is possible, therefore, that his heavy duties during the march referred to and the serious sickness that followed may have been the instrumentalities which brought about the alleged rupture, or ruptures. In view of all the facts heretofore indicated, it is believed that it would be but just to so hold, and to declare that the said disability was the result of service in line of duty.

There is good authority for this position in former decisions of this Department wherein it was ruled that when prior soundness of a soldier was well established, and it was shown that he was suffering at the time of his discharge from a disability incident to the service, and there was nothing adverse shown by the evidence, it would be presumed that

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the disability was incurred in line of duty. In this particular case, at any rate, the facts seem to justify such a presumption. And this is further confirmed by the fact that the record, although it does not show the cause or origin of the hernia, contains no intimation that it was not the result of the service. It is concluded, therefore, that the claimant is entitled to a pension on account of the said disability, and the action rejecting this claim is accordingly reversed.

As regards the fact that claimant alleged only that he was badly ruptured, as told him by the surgeon, without stating whether the rupture was single or double, and as the certificate of disability only mentions an inguinal hernia, it might be inferred that there was but one hernia existing while he was in the service, but inasmuch as Dr. Green testified positively that there was a double hernia while the claimant was in the hospital, and other evidence shows that he has had the same since discharge, it is reasonable to conclude that both herniæ were incurred about the same time, and that claimant's allegations are sufficient to cover both. The papers are herewith returned with direction that the claim be readjudicated in accordance with the views herein expressed.

APPEAL—REVIEW—FEE AGREEMENTS—DIFFICULTY AND TROUBLE.

ANNIE HIGGINS, WIDOW (CLAIMANT).

MILO B. STEVENS & CO. (ATTORNEYS).

Upon appeal the papers in a claim will not be reviewed to determine whether the Commissioner of Pensions properly refused to recognize articles of agreement in a claim of difficulty and trouble, unless the facts as recited on appeal present such showing as would warrant the belief that gross injustice has been done in refusing to recognize articles of agreement.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

Milo B. Stevens & Co., of Washington, D. C., on May 6, 1901, filed a motion to reconsider the decision of the Department of April 17, 1901, in the claim of Annie, widow of Henry Higgins, Company D, Ninety-seventh Pennsylvania Volunteer Infantry, affirming the action of the Bureau in refusing to certify to them a fee in excess of $10 (certificate No. 364876).

On March 8, 1893, the late George E. Lemon, of Washington, D. C., in behalf of the claimant, filed a declaration for a widow's pension under the general law. Certificate issued June 12, 1896, to allow pension in the claim at $8 per month from October 18, 1892, the date of the soldier's death, with $2 additional on account of each minor child of the soldier.

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Mr. Lemon, July 16, 1896, addressed a letter to the Bureau, in which he claimed that the widow should have been allowed the rate of $12 per month in lieu of $8, as the evidence established that she and the soldier had contracted a common-law marriage prior to March 19, 1886, the date of the approval of the act increasing the rate from $8 to $12 per month to widow pensioners who were married to the soldier on account of whose service and death their claims are made prior to the approval of said act.

The appellants, on October 2, 1897, filed articles of agreement stipulating for the payment of a fee of $25. They entered, October 6, 1897, an appeal from the action of the Bureau in refusing to allow the rate of $12 per month. The action of the Bureau was reversed by decision of this Department, dated January 31, 1899, and on March 4, 1899, certificate issued to correct the rate of pension allowed from $8 per month to $12 per month. On said issue Messrs. Stevens & Co. were certified a fee of $10. On appeal they contend for the payment of a fee of $25 under said articles of agreement.

Relative to the issue presented the Department said:

In the opinion of the Commissioner of Pensions the prosecution of the claim did not require such services by an attorney as would warrant the recognition of articles of agreement. The question is one for the Commissioner of Pensions to decide, and it appears that he has passed upon it. The claim is not one of the classes which the law directs that fee agreements shall be recognized, if filed, nor, in the opinion of the Commissioner of Pensions, is it one of such difficulty and trouble as to warrant him in recognizing fee agreements. Therefore, the action of the Bureau in refusing to certify a fee in excess of $10 was proper. (See case of Merrill B. Lammon, certificate No. 28402, 38 Fee P. L. Bk., 117.)

In this motion for reconsideration the appellants state as follows:

The question in this case is as to the recognition of fee agreements for $25 in an alleged case of difficulty and trouble. It is held that inasmuch as in the opinion of the Commissioner of Pensions it was not a case of difficulty and trouble, therefore, the refusal to certify a greater fee than $10 was proper, In other words, it is apparently held that the Secretary of the Interior has no authority to review a decision of the Commissioner of Pensions as to what should be considered a case of difficulty and trouble. The merits of the question whether or not the case was one of difficulty and trouble, were not considered, but the case was apparently decided on the legal proposition that the Secretary of the Interior has no appellate jurisdiction on the question. It is believed that the proposition is erroneous. * * *

It has been held in the case of E. H. Gelston & Co., attorneys for Julia Newcomb (5 P. D., 419), that the exercise of the discretionary power of the Commissioner of Pensions in determining the allowance of the fee of $25 in difficulty and trouble cases is a matter exclusively within that officer's control, and that the Department will not interfere except in a case of extraordinary and flagrant injustice. The decision in the case at bar seems to go a step further and to hold that the Department will not interfere in any case. It is submitted that if, in the case of Newcomb, the decision was correct in so far as it recognized the reviewing authority of the Secretary of the Interior in such cases, it is not apparent why the authority was limited to cases of extraordinary injustice. It would seem that a case of ordinary injustice is as much within the authority of the Secretary to correct as a case of extraordinary injustice. If the

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Secretary has appellate authority in one class, he also has it in the other. To determine whether or not the case was one of extraordinary injustice involves an inquiry into the facts of the case. Such an inquiry was apparently denied in the case at bar. * * *

Unquestionably the Department has appellate jurisdiction as to the allowance of fees in claims for pension where there is an issue between the Bureau and the attorney who prosecutes a claim as to the amount of fee to be allowed for his services therein, and an appeal will lie from the action of the Bureau in the matter. Upon appeal presenting such question the Department will determine whether the proper amount has been certified, and, when germane to the issue, determine whether the claim is one in which a fee of not more than $25 can be certified, or whether a fee of $10 only can be certified. This latter question seems to be what is presented by this motion, i. e., whether the fee in the present case shall be $25 or $10. As stated, appellants contend that the case involved so much difficulty and trouble in its prosecution as would warrant the Commissioner of Pensions in seeing fit to recognize articles of agreement filed in the claim.

In the case of E. H. Gelston & Co., supra, the material facts in all essential particulars are like those arising in this case. The issue is discussed at considerable length, and the conclusion was reached that the provisions of section 4786, Revised Statutes, as hereinafter set forth; confer—

simply upon the Commissioner a discretionary power which he is at liberty to exercise or not in such cases as are enumerated by the law—he being neither restrained nor directed by either the law or the head of the Department (page 422) * * * unless, perhaps, there should appear an instance of flagrant injustice necessitating departmental action (page 423).

That portion of the act of July 4, 1884, which authorizes the payment of a fee of $25 in certain classes of claims and is relevant to the issue presented in this case, reads as follows:

And such articles of agreement as may be filed with the Commissioner of Pensions are not authorized nor will they be recognized except in claims for * * * and in such other cases of difficulty and trouble as the Commissioner of Pensions may see fit to recognize them.

It is quite clear the law does not direct that articles of agreement shall be recognized in all cases of difficulty and trouble. A case may require a great deal of work in its prosecution and yet not be one in which the attorney under the law could secure a fee of $25. The appellants' view of the law is, that upon appeal from the action of the Bureau in refusing to recognize articles of agreement this Department will review the work performed in a claim, and if a conclusion is reached that the services rendered by an attorney, in the opinion of the Secretary of the Interior, are of such amount and such difficult nature as to warrant the payment of a fee of $25, the Secretary of the Interior will direct the Commissioner of Pensions to pay such fee,

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although the Commissioner had not seen fit to recognize articles of agreement filed in the claim.

In other words, in the opinion of the appellants the same duty is placed by the law upon the Secretary as it places upon the Commissioner of Pensions, and requires of the former to examine details for the purpose of ascertaining whether the latter has acted with due discretion and judgment in each particular case in which the interested attorney may deem that he has performed sufficient work in its prosecution to warrant the Commissioner of Pensions in recognizing articles of agreement. Is is not believed that the intent of Congress, by vesting in the Commissioner of Pensions a discretion as to the recognition of articles of agreement in certain classes of claims, was to burden this Department with the work of reviewing his act in the premises. It is true that the Department, upon appeal from the action of the Bureau in refusing to recognize articles of agreement in those claims, can properly take cognizance of the matter and investigate any detail that may be necessary to arrive at a proper conclusion; but it is only when the injustice plainly appears from matter recited in the appeal that the Secretary of the Interior would be warranted in reviewing the action of the Bureau. When injustice is alleged in the appeal and is based upon facts which are recited therein as sustained by the record, then examination might be made for the purpose of ascertaining whether the alleged facts are disclosed by the record. But unless such facts are set forth in the appeal it is not believed that it is necessary to review the papers in the case for the purpose of ascertaining how much service an attorney did perform therein, and the Department, since its decision in the case of E. H. Gelston & Co., has invariably declined to do so.

When the performance of an act is within the discretion of an officer he is permitted to determine matters in the premises to his satisfaction, and where he has impartially performed the duty, with due regard to the rights of all interested parties, it is quite clear that an abuse of his discretion will not be inferred from a mere assertion that he has been unjust. It is presumed that the Commissioner of Pensions in determining whether articles of agreement should be recognized when that matter is within his discretion gives it such fair consideration as it is entitled to, and in order to justify any interference by this Department facts must be shown by an appellant which would import that the Commissioner of Pensions had not performed his duty.

So, when an appellant does not recite facts which would warrant any interference by this Department with the act of the Commissioner of Pensions in a matter within his discretion, but in lieu thereof asserts that the claim is one of such difficulty and trouble as in his opinion would warrant the Commissioner of Pensions in seeing fit to recognize

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articles of agreement, nothing would be presented for consideration other than whether the case is one in which the recognition of agreements is within the discretion of the Commissioner of Pensions and whether he has exercised such discretion. For these purposes nothing need be added to or taken from the decision heretofore rendered by the Department in this case.

Accordingly this motion is overruled.

NOTICE—APPEAL—SERVICE—EVIDENCE—ACT MARCH 3, 1899.

SOPHIA M. LOUGHRY *v.* JOHN LOUGHRY.

1. In the absence of proof of service of an appeal and notice thereof, there being no waiver of service by the appellee, such appeal will be dismissed.
2. Due proof of service may be shown by a written acceptance of service by the appellee or her attorney, or a registry return receipt, signed by the appellee or her attorney, and forwarded by the appellant or his attorney with an affidavit that on a certain day a copy of the appeal or proposed appeal has been mailed in a registered letter, postpaid, to the appellee at a certain named post-office, naming it, and that the card was returned in acknowledgment of the receipt of such letter; or an affidavit showing that on a certain day and place a copy of the appeal was personally delivered to the appellee or her attorney of record.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

John Loughry, late private, Company E, Twelfth West Virginia Infantry, and pensioner under certificate No. 114841, appealed July 29, 1901, from the Bureau action of May 4, 1901, allowing the deserted wife's claim of Sophia M. Loughry, filed May 4, 1901, under the act of March 3, 1899, on the ground that "pensioner deserted his lawful wife, who is a person of good moral character and in necessitous circumstances."

No copy of the appeal or notice of the appeal appears to have been served on the appellee or her attorney, and she has entered no appearance in the appeal or in any manner waived her right to notice, or in any manner indicated that she has knowledge of said appeal, as required by the rule of practice announced in the case of Ellis *v.* Ellis (11 P. D., 288) and the departmental instructions of May 1, 1901.

As announced in said decision and instructions, the appellant in cases of this nature is required to make due proof of service of the copy of the appeal and notice of the appeal upon the appellee or his or her attorney of record, after which thirty days will be allowed the appellee within which to file a brief and argument in support of the Bureau action appealed from.

Due proof of service may be shown by a written acceptance of service by the appellee or her attorney, or a registry return receipt signed

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by the appellee or her attorney and forwarded by the appellant or his attorney, with an affidavit that on a certain day a copy of the appeal or proposed appeal has been mailed in a registered letter postpaid to the appellee at a certain named post-office, naming it, and that the card was returned in acknowledgment of the receipt of such letter, or an affidavit showing that on a certain day and place a copy of the appeal was personally delivered to the appellee or her attorney of record.

Due proof of service may be made in either of the three methods above indicated, but in absence of proof of service in some one of the ways above indicated the appeal can not, in the absence of waiver of service by the appellee, be deemed to be completed, and will be dismissed by the Department.

This appeal is accordingly dismissed.

Pensioner also, on July 16, 1901, filed a motion that payment of one-half his pension to his wife be suspended pending the decision on the appeal.

It will not be assumed that the Bureau would continue the payment of money to the wife while the question as to her right to receive the same was pending before the Department; but, as already indicated, the appeal in this case not being perfected by proof of service of notice the motion must also be dismissed.

A copy of this decision will be forwarded by the Bureau to both parties.

NOTICE—APPEAL—EVIDENCE—PROOF SERVICE—ACT OF MARCH 3, 1899.

ELIZA J. CONOVER *v.* WILLIAM CONOVER.

An affidavit stating that a copy of the appeal attached thereto had been sent through the mail to the address of the claimant as given by the Pension Bureau is not due proof of service of the appeal, as the proof should show that the same was mailed by registered letter, and that the return registry receipt attached to such proof was the receipt for the registered letter containing a true, full, and complete copy of said appeal and the notice of appeal.

Assistant Secretary F. L. Campbell to the Commissioner of Pensions, August 31, 1901.

William Conover, late private, Company E, One hundred and seventy-fifth Ohio Infantry, and a pensioner under certificate No. 241602, appealed May 21, 1901 (filed in this Department July 30, 1901), from the Bureau action of May 13, 1901, allowing the deserted wife's claim of Eliza J. Conover, filed February 20, 1901, under the act of March 3, 1899, on the ground that "pensioner deserted claimant, his lawful wife, who is a person of good moral character and in necessitous circumstances."

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In the letter of transmittal of July 25, 1901, you state that—

The claim under the act of March 3, 1899, was originally filed May 1, 1899, and was allowed August 19, 1899. The wife's name was dropped from the roll February 15, 1901, in accordance with the terms of the Rothery decision. An appeal was filed May 25, 1901, by the pensioner, docket No. 69045, the contention in the appeal being that this Bureau had not refunded to the pensioner the amount of money paid to the wife under the allowance of August 19, 1899. This appeal was decided and the opinion rendered June 13, 1901, and your instructions contained therein have been carried out, and payment has been ordered to the pensioner of the amount paid to his wife on the allowed claim.

The wife filed a new claim on February 20, 1901, which was allowed May 13, 1901. On May 23, 1901, the attorney for the pensioner filed an appeal in this Bureau, which is transmitted herewith, with the request that it be docketed.

As will be seen by the affidavit filed May 21, 1901, the pensioner seems to have served upon his wife, the appellee, a copy of the appeal, which would comply with the Ellis decision.

The proof of service of notice of the appeal is as follows:

STATE OF OHIO, *Hamilton County, ss:*

On this 20th day of May, 1901, personally came before me, a notary public in and for said county, William Conover, who, being duly sworn according to law, deposes and says that he this day sent through the mail to his wife, Eliza J. Conover, a copy of the petition hereto attached and notice of appeal to No. 3225 Eastern avenue, Cincinnati, Ohio, her address as given by the Pension Bureau in letter of allowance dated May 13, 1901.

Subscribed and sworn to, etc.

Claimant has not entered her appearance in response to said appeal or in any manner indicated that she received said notice.

The affidavit of the pensioner fails to show that "due proof" of service required in the Ellis case (11 P. D., 288), and indicated in departmental communication of May 1, 1901, wherein it was stated:

In response to your request of April 23, 1901, that your "Bureau be advised as to what would be considered by the Department as 'due proof' of service by appellant upon appellee of copy of appeal taken," referring to departmental decision of February 23, 1901, in the case of Ellis *v.* Ellis, No. 500352, docket No. 63997, I respectfully suggest that "due proof" would naturally indicate such proof as would, prima facie, show that the appellee had been furnished information as to the appeal proposed to be taken by the appellant to secure a reversal or modification of the Bureau action appealed from and advised of his right to interpose an answer or defense thereto. For example, a written acceptance of service by the appellee, or his or her attorney of record, of a copy of the appeal, or a registry receipt card signed by the appellee, and forwarded by the appellant or his or her attorney, with an affidavit that on a certain day a copy of the appeal or proposed appeal had been mailed in a registered letter, post paid, to the appellee at a certain named post-office, naming it, and that the card was returned in response to said letter; or an affidavit showing that on a certain day and place a copy of the appeal was personally delivered to the appellee, or his or her attorney of record.

In either of the foregoing cases I should deem the service of notice established, prima facie, by "due proof."

Where service of notice is by mail it should, in the absence of acceptance of service or appearance on the part of the party served, be

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by registered letter and the affidavit showing such service should be accompanied by the registry return receipt, signed by the party to whom notice was sent or his or her attorney of record.

Claimant in her declaration filed February 20, 1901, alleged that—

> Pensioner deserted her August 10, 1896, since which time he has refused to support her, and still refuses, and, it is said, lives with another woman; she submits the same evidence filed heretofore. Her said husband has not returned to her, but is living separate and apart from her still.

She filed in support of her said declaration the joint affidavit of two witnesses who testified that pensioner deserted her over three years prior to 1901, and still continues to live separate and apart from her; that she was a woman of good moral character and in necessitous circumstances; that pensioner was a worthless fellow.

This comprises all the testimony filed by the claimant in support of her said declaration, and she evidently relied upon the testimony filed by her in support of her former void declaration of May 1, 1899.

The pensioner denies his desertion of claimant and contends that he was driven from his home and from claimant by cruel and unwifely conduct on her part; that she is not a woman of good moral character; that she had assaulted him with a knife without cause, inflicting personal injury upon him; that she applied vile and abusive epithets to him and threatened him with further violence if he did not leave her; that she made his "home a hell," and forced him to leave her; that he is 83 years of age, and that it was not safe or possible for him to live with her.

He has furnished the affidavits of a large number of witnesses who testify to certain conduct upon the part of claimant, which, if true, would tend to establish legal justification for his leaving her.

Claimant, on the other hand, filed a number of affidavits under her first declaration tending to show that pensioner's absence was not legally justified.

All of these affidavits constitute ex parte testimony, and the testimony of the witnesses is very conflicting.

In view of the conflicting evidence as to whether pensioner's absence from his wife was legally justified, as well as the defective proof of service of notice of this appeal upon the appellee, who has entered no appearance in the appeal, the case is reopened and a special examination ordered, due notice of which examination will be given both parties.

The papers are herewith returned for further action and report.

Copies of this decision will be furnished the parties hereto.

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1. The act of March 2, 1895, is the law of distribution of accrued pension of a deceased pensioner, and applies to the fund in the hands of a guardian unexpended at the time of such pensioner's decease.

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2. Pension having erroneously been granted to the soldier under the act of June 27, 1890, he having aided and abetted the late rebellion against the authority of the United States, section 4716, Revised Statutes, positively prohibits the payment of the pension that may have accrued to him to the date of his death to his widow.

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As a Cause for Pension.

1. The fact that a claimant has attained the age of 65 years does not entitle him to pension per se, under section 2 of the act of June 27, 1890, regardless of his mental or physical condition, and such was not the view expressed in the case of Francis Frank (9 P. D., 68); but the evidence in this case disclosing the fact that claimant is by trade a pattern maker, and that by reason of age, disease of heart, limitation of motion in knee and shoulder, enlarged veins of leg, and stiffness and limitation and atrophy of hand he is unable to follow said occupation, the action rejecting his claim was error, and is reversed. (Charles Stone, 8 P. D., 477, and William Featherly, 9 P. D., 106.)
J. Louis Will 179

Military Age.

2. In 1861 the enlistment of a minor under the age of 18 years was voidable, and a repudiation of such enlistment on the part of the minor by the act of desertion would constitute no bar to pension on account of a disability incurred during the period of a second enlistment.
Stephen F. Monthony 193

3. This claimant being over 18 but under 21 years of age at the date of his enlistment in June, 1861, such enlistment was valid and binding upon him; and any disability incurred by him during the term of such enlistment but after his desertion therefrom and while serving in the United States Navy was not contracted in line of duty.
Edward E. Napier 240

4. Appellant's name was dropped from the roll on the ground that he was a deserter from a former enlistment. The contention is that he was under 16 years of age at the time of his first enlistment in September, 1863, and is therefore not barred on account of such desertion. In his oath of enlistment he reported his age as 18 years. He is bound by this action.
Nathan Loeb, alias Nathan Lyons 286

AID AND ATTENDANCE.

Facts Showing—

1. The appellant is pensioned at the rate of $30 per month (second grade) for gunshot wound of left arm and injury to left chest and resulting disease of heart and epilepsy. From the facts presented in the case it is shown that he has frequent (almost daily) and severe epileptic seizures, necessitating the frequent and periodical personal aid and attendance of another person.
Joseph Lewis 473

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2. The disability on account of which pension was granted, resulting from epilepsy, manifested by a clonic spasm of the extremities, occurring but two or three times a year, is not deemed to exist in such a degree as to require frequent and periodical personal aid and attendance of another person.
John Blaisdell 503

Commencement.

3. Increase to $50 per month under the act of July 14, 1892, can only commence from the date of the certificate of the examining surgeons showing such degree of disability made subsequent to the passage of said act.
John Blaisdell 503

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AMPUTATION.

1. It having been established that the amputation of soldier's arm was made "at or above the middle of the arm bone" (humerus), the failure to show the exact line of section does not affect the status of the case, and pensioner was entitled to a pension at the rate of $45 per month, instead of $36, under the provisions of the act of August 4, 1886, from the date of the passage of said act to the date of his death. (See case of John W. Curran, 5 P. D., 1.)
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APPEAL.

See also NOTICE, 523 AND 524; PRACTICE, 325.

1. Upon appeal the papers in a claim will not be reviewed to determine whether the Commissioner of Pensions properly refused to recognize articles of agreement in a claim of difficulty and trouble, unless the facts as recited on appeal present such showing as would warrant the belief that gross injustice has been done in refusing to recognize articles of agreement.
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1. An agent or attorney rendering services in proceedings under the act of March 2, 1895, in behalf of a person entitled under its provisions to the accrued pension on a certificate of pension of a deceased pensioner, must look to the person by whom he is employed for payment for his services. Case of George Aab (9 P. D., 377) is overruled.
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Material Service.

2. Where two declarations for straight increase are filed in behalf of a pensioner, they do not constitute the basis of different claims, unless a medical examination was held between the dates on which the declarations were filed, or unless the claim based on the first declaration is disposed of without holding a medical examination, and thereafter a second declaration is filed; with these exceptions declarations for increase filed subsequently to the first until a medical examination is held are but duplicates of the first declaration, and the filing thereof is not material service.
Alfred Carpenter 429

3. The filing of an amendatory declaration in a claim for original pension, under the act of June 27, 1890, at any time prior to the holding of a medical examination, is material service and may entitle an attorney to the fee.
John Fitzpatrick 490

Fee Earned.

4. Where an attorney has prima facie established a claim for pension, and no call for additional evidence has been made, he has earned the fee, though subsequently to his death another attorney filed evidence for which the Bureau could have issued a call.
Annie E. Myers (widow) 392

Neglect.

5. The rule that when a claimant does not comply with an order for medical examination, and thereupon the failure of the attorney on notice thereof to file the claimant's request for the issuance of another order constitutes neglect, is limited in its application to claims for straight increase.
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ATTORNEYSHIP.

Recognition.

1. The following rule, laid down in the case of Ezra Garner, dated November 26, 1898, and in the case of John Dennert, dated July 30, 1898, is affirmed, viz: Where an attorney who has been recognized by the Bureau subsequently has been denied recognition does not appeal for recognition within a reasonable time thereafter he thereby forfeits all rights he may have in the case from the time he was so notified.
The rule does not contemplate attorneys contesting for recognition whose rights would become forfeited upon their failure to call up a case at proper intervals.
John Quinn 25

2. When the Bureau has adjudged that one of several contesting attorneys is entitled to recognition, and such others acquiesce in said decision, further recognition can not be denied the one and accorded to any of such others on the ground that the one did not conform to the rules in regard to formal service at a time prior to the decision of the Bureau upon which his title to recognition is based.
Joseph Lane, alias Joseph Simpson 422

BEATY'S INDEPENDENT SCOUTS.

See SERVICE, 141.

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See PATHOLOGICAL SEQUENCE, 462.

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BOARD OF ENROLLMENT.

1. This appellant's service was rendered as a commissioner of the board of enrollment of the Second Congressional district of the State of Missouri. He filed an application for pension, under the provisions of the general pension law, on account of disease alleged to have been contracted during said service; and also an application for pension, under the provisions of the second section of the act of June 27, 1890, on account of said service: *Held*, That there is no provision of law granting pension for disease contracted while serving as commissioner of board of enrollment, and that such service is not a pensionable service under the provisions of the second section of the act of June 27, 1890.
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See DEATH CAUSE, 62.

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See also AID AND ATTENDANCE, 503; DECLARATIONS, 162; INCREASE, 380; PRACTICE, 451; SPECIAL ACT, 424.

Section 4713, R. S.

1. Under the provisions of section 4713, Revised Statutes, pension, if allowed, could only commence from date of filing the last material evidence necessary to complete the claim.
William McClain 175

Act March 3, 1879.

2. The date of commencement of a dependent mother's pension, under the general law, is governed by the act of March 3, 1879.
Eliza Hodgman (mother) 18

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Act January 5, 1893.

3. The increase of pension provided by the act of January 5, 1893, for survivors of the Mexican war who have been pensioned under the provisions of the act of January 29, 1887, or the act of March 3, 1891, should be made to commence from the date, subsequent to the date of the approval of the act granting said increase, at which it shall have been established by the proof that the conditions of disability and destitution existed which are designated in said act as entitling such pensioners to the increase of pension therein provided.

Robert Markwood 380

Act June 27, 1890.

4. The construction of the act of June 27, 1890, under which a minor's pension is made to commence from the date of filing the application therefor, in a case in which there was a prior widow pensioner who has died or remarried, is adhered to. The application, filed in October, 1895, which was rejected as an application under the general law, is held to have been an application under the act of June 27, 1890, and the date of filing said application is the correct date of commencement of the minor's pension.

Minors of Simeon W. Dare 431

5. Pension under section 3 of the act of June 27, 1890, can commence only from date of filing of declaration subsequent to the soldier's death, and a declaration executed by the wife prior to his death is null and void.

Mary J. Fisk (widow) 162

6. Original invalid pension granted under the provisions of section 2 of the act of June 27, 1890, must commence from the date of filing an application therefor, and the action of the Bureau in commencing the pension in this case from the date of the examining surgeon's certificate of examination was error.

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COMMISSIONERS OF BOARD OF ENROLLMENT.

See SERVICE, 183.

COMPOUNDING RATES.

See RATE, 165.

CONSCRIPTION.

See DISLOYALTY.

CONSTRUCTION OF STATUTES.

See also MINORS, 448; RANK, 34.

Act March 3, 1899.

1. The act of March 3, 1899, is prospective, not retroactive, in its operation, and the desertion named therein refers only to such as occurs subsequent to the passage of the act. The word "desertion" in said act is used in its general legal sense, and means the willful withdrawal of one of the married parties from the other or the voluntary refusal of one of the married parties to renew a suspended cohabitation without legal justification.

Mary Ann Rothery v. Henry N. Rothery 77

2. To entitle the deserted wife of an invalid pensioner to receive one-half the pension of her husband under the provisions of the act of March 3, 1899, it must appear that she has been deserted by said pensioner for a period of over six months subsequent to the date of the passage of said act, said act being wholly prospective, and not retroactive, in its operation and character. (See case of Mary Ann Rothery *v.* Henry N. Rothery, 11 P. D., 77.)

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3. The application of Catharine Richards under the act of March 3, 1899, for one-half the pension of this appellant, James J. Richards, having been filed in the Pension Bureau on April 15, 1899, less than six months from the date of the passage of said act, was premature, ineffective, and void, no legal rights whatever having accrued to her on said date under the provisions of said act.
Catharine Richards v. *James J. Richards*..... 90

DEATH CAUSE.

See also EVIDENCE, 301; LINE OF DUTY, 103; PATHOLOGICAL SEQUENCE, 388.

Medical Referee's Opinion.

1. It is contended in a motion for the reconsideration of departmental decision of August 11, 1900, in the case at bar, that the rules laid down in the case of the widow of Charles F. Brown (3 P. D., 92), and in the case of Minnie Shuttleworth (3 P. D., 50), respectively, should govern in this case: *Held*, That in the rules laid down in the cases cited, to the effect that the medical referee's opinion must "have some evidence to support it, and some facts proven upon which to base it," before it can be accepted in preference to "the diagnosis made and the opinion expressed" by the attending physician of a soldier in his last illness as to the actual cause of the latter's death, it was not the intention of the Department to place any restrictions upon the official acts of the medical officers of the Bureau which should not equally apply to the medical evidence filed in such cases, and that inasmuch as no other good or sufficient reason is shown why former departmental action in the premises should be receded from the pending motion in the case is overruled.
Margaret Lalone (*widow*)..... 301

Pathological Sequence.

2. The deceased officer was formerly a pensioner at total of rank as major ($25 per month) on account of "fracture of right elbow." His death, on February 23, 1898, according to the return thereof made by the attending physician, wa due to "amyotrophic lateral sclerosis and acute pneumonitis."

3. Pneumonitis (pneumonia) being an acute disease—due to a specific germ—could not have been a result of his military service; and his medical attendant's testimony to the effect that the amyotrophic lateral sclerosis was a pathologic sequence of the fracture of right elbow not being in harmony with the holding of recognized medical authorities to the effect that the etiology of such disease is as yet unknown, the arbitrary and unsupported professional opinion or theory of this affiant can not be permitted to control the judgment of the Department in this case, which is: That the appellant has no title to a pension under the general law as the case now stands.

4. The decedent's discharge from Company G, Twentieth Illinois Infantry, according to the decision of the War Department, which has sole jurisdiction in such matters, not having been an honorable discharge, his relict, the appellant, has no title to a pension under the provisions of section 3, act of June 27, 1890.
Matilda C. Tunison (*widow*)..... 440

5. Death of the soldier (who was over 50 years of age) from cerebral hemorrhage can not be accepted as due to injury to left testicle and varicose veins of right leg and resulting amputation of same above the knee, for which he was pensioned. Senile degeneration of the arteries is universally admitted as the most potent cause of said fatal disease, and this is shown to have existed in this case, so that the burden of proot rests on those advancing a contrary opinion.
Maria Brantigan (*widow*)..... 388

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6. The late officer was pensioned under the general law on account of a gunshot wound which destroyed the right eye and fractured the bones of the orbit. His death is shown to have been due to disease of the brain, or meningitis: *Held*, That, in the absence of any other more probable cause for infection than the continued disease in the orbit, the fatal disease was caused primarily by the gunshot wound.

Rebecca C. Morgan (widow) 220

7. The soldier's death is shown to have resulted from disease of kidneys, caused by ether anaesthesia, induced for the purpose of operating on a diseased right testicle, for which not pensioned, and for the radical cure of a right inguinal hernia and hydrocele, for which pensioned: *Held*, That inasmuch as the pensioned disabilities were included in the operation leading to the soldier's death, the widow is entitled to pension.

Elisabet Kaufman (widow) 106

8. Soldier's death from quick consumption, following an attack of pneumonia, can not be accepted as due to chronic diarrhea of service origin, said diarrhea not being an important controlling factor in nor so complicated with said death cause that its influence can not be separated therefrom.

Mary E. Dolan (widow) 62

Minor of Harla Dolan 62

9. Soldier's death from pulmonary tuberculosis can not be accepted as due to nasopharyngeal catarrh, on account of which he was pensioned at $2 per month, and it not appearing that catarrh was otherwise a factor in the death cause, nor that said cause was the result of his army service, the rejection of the claim on that ground was proper.

Florence E. Foster (widow) 480

10. The soldier's death, at the age of 72 years, of cerebral hemorrhage can not be properly regarded as due to the gunshot wound through the neck incurred thirty-six years prior thereto, and for which he was pensioned.

Emily O. Dilworth (widow) 459

DECLARATIONS.

See also ATTORNEYS, 429 AND 490; JURISDICTION, 257 AND 420.

Amendment.

1. A declaration in which the formal parts indicate a claim under the act of June 27, 1890, but which contains allegations of a service not in the war of the rebellion and of disability contracted in said service and line of duty, is subject to amendment and explanation as to any uncertainty in the character of the claim or the claimant's intentions relative thereto.

Felix Myers 315

Duplicate.

2. Where two declarations for straight increase are filed in behalf of a pensioner, they do not constitute the basis of different claims unless a medical examination was held between the dates on which the declarations were filed, or unless the claim based on the first declaration is disposed of without holding a medical examination and thereafter a second declaration is filed. With these exceptions, declarations for increase filed subsequently to the first until a medical examination is held are but duplicates of the first declaration, and the filing thereof is not material service.

Alfred Carpenter 429

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Execution.

3. Pension under section 3 of said act can commence only from date of filing of declaration subsequent to the soldier's death, and a declaration executed by the wife prior to his death is null and void.
Mary J. Fisk (widow) 162

4. The declaration purports to have been made on August 10, 1888, before the deputy clerk of the circuit court of Macomb County, Mich., but the evidence shows that the same was executed in Grand Traverse County, of said State: *Held*, The declaration is invalid.
Samuel Berry 210

Filing.

5. Soldier executed his declaration and mailed it to the Commissioner of Pensions, but died six days prior to the date of its receipt at the Pension Bureau: *Held*, A pension claim is not pending until the date of the filing of the declaration, for the Commissioner of Pensions attains no jurisdiction until the declaration is filed. The Commissioner of Pensions could have no jurisdiction over a dead person, and the filing of said declaration was of no force or effect.
Asa H. Dilley 257

6. A declaration for pension is of no force or effect whatever until filed in the Bureau of Pensions.
Anthony O'Grady, alias John Davis 420

Sufficient.

7. A declaration in a pension claim, aside from its formal parts, is not invalid if it substantially sets forth the facts upon which the claim is based. It is sufficiently certain if it can be made certain. Because it is subject to amendment to make more definite and certain, it is not thereby invalid.
Alphonso W. Ellis 93

DECREE.

See also JURISDICTION, 226 AND 406; MARRIAGE, 271.

Interlocutory in Missouri.

1. Under the civil practice of Missouri an interlocutory decree of default in a divorce case, no trial being had nor decree entered upon the merits of the case, is not a decree dissolving the bonds of matrimony existing between a plaintiff and defendant, notwithstanding such decree states that said bonds are dissolved, "and that unless the defendant appear at the next regular term" and "show good cause to the contrary, judgment will be finally rendered." * * *
Adaline Long (alleged widow) 499

Jurisdictional Facts.

2. The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Indiana while she resided in Arizona. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known. This statutory requirement being omitted, it is fatal to the jurisdiction of the court.
Annie M. Shipp (widow) 226

3. The decree of divorce obtained by the soldier in the State of Arkansas in 1879 against the claimant, who was in the State of Illinois, is void for the reason that the statutory requirement that the warning order should be published was not complied with.
Elizabeth Williamson 406

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See DECREE.

DEPENDENT PARENTS.

See also FEE, 171 AND 514; RATE, 18.

Election under what Law Prosecuted.

1. An applicant for a dependent parent's pension may, if he or she so elects, make and prosecute a claim under the provisions of section 4707, Revised Statutes, without regard to the provisions of section 1 of the act of June 27, 1890.

Katherine A. Ratcliff (mother) 171

2. Where a dependent parent's claim was filed and prosecuted wholly under section 4707, Revised Statutes, and calls were made by the Bureau of Pensions for evidence of dependence at the date of the soldier son's death, and the proof furnished establishes dependence at date of soldier's death, and the provisions of section 1 of the act of June 27, 1890, have in no manner been invoked, it is error to issue the certificate, upon the allowance of the claim, under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890. In such a case the attorney prosecuting the claim should be certified such fee as agreed upon, evidenced by properly executed duplicate fee agreements filed in the claim, not exceeding $25.

Kathrina Blitch (mother) 247

Facts Sufficient to Show.

3. The appellant obtains a comfortable support from a farm on which he resides with his wife and son, the title to said farm being in the wife: *Held*, While section 6295, statutes of Michigan, allows the wife to hold and convey property free from interference and joinder by her husband, yet the said statutes do not deprive the husband of the enjoyment and use of the wife's real estate, a right belonging to him under the common law.

Thomas Garner (father) 297

DESERTION.

See also DISCHARGE, 13.

A Bar to Pension.

1. Appellant's name was dropped from the roll on the ground that he was a deserter from a former enlistment. The contention is that he was under 16 years of age at the time of his first enlistment in September, 1863, and is therefore not barred on account of such desertion. In his oath of enlistment he reported his age as 18 years. He is bound by this action.

Nathan Loeb, alias Nathan Lyons 286

2. It appearing from the official record of this appellant's military service, and from the other evidence in the case, that at the date he incurred the disabilities in the service on account of which he was formerly pensioned, he was in desertion from a prior term of service, and was at said time absent from his proper command without leave and not in the line of duty, he is not entitled to be restored to the pension roll under the present rulings and decisions of this Department. See cases of John Norton (9 P. D., 382) and widow of John Sullivan (10 P. D., 55).

Lewis Rankin 373

Not a Bar to Pension.

3. In 1861 the enlistment of a minor under the age of 18 years was voidable, and a repudiation of such enlistment on the part of the minor by the act of desertion would constitute no bar to pension on account of a disability incurred during the period of a second enlistment.

Stephen F. Monthony 193

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4. The appellant first enlisted, under the name of Patrick H. Burns, for two years, in Company B, Thirty-fifth New York Volunteer Infantry, and served therein until February, 1862, when he deserted, and was never formally discharged therefrom. He enlisted a second time on August 7, 1862, while a deserter from said organization, under his correct name of Henry P. Burns, for three years, in Company M, Fifth New York Heavy Artillery, and served therein until June 26, 1865, when he was mustered out and honorably discharged the service with said company. He was pensioned under the provisions of the general pension law for an injury to head and back, incurred in July, 1864, during his second term of enlistment. On February 9, 1897, he was dropped from the rolls because of his desertion from Company B, Thirty-fifth New York Volunteer Infantry: *Held*, That appellant's contract of enlistment in Company B, Thirty-fifth New York Volunteer Infantry, having expired by limitation long prior to the incurrence of the injury for which he was pensioned, the offense of desertion terminated with said contract of enlistment, and at the time of the incurrence of said injury he was no longer in desertion, but was in line of military duty under his second enlistment, and occupied a pensionable status, and the action dropping him from the rolls because of desertion from his first service was error. (See case of John Norton, 9 P. D., 382.)

Henry P., alias Patrick H. Burns 332

5. A soldier is pensionable for a disability incurred subsequent to the expiration, by limitation, of a term of enlistment from which he had deserted and was never discharged, notwithstanding the fact that the second contract of enlistment was entered into prior to the expiration of the first term of enlistment, provided said second term of enlistment be faithfully performed and completed, and be not avoided by the United States.

Henry P., alias Patrick H. Burns 362

DESERTED WIFE.

See DIVISION OF PENSION, ACT MARCH 3, 1899.

DIFFICULTY AND TROUBLE.

See APPEAL, 519.

DISABILITY.

See also INCREASE, 51; ORIGIN, 329; PRACTICE, 455; RERATING, 299.

Age not per se a Disability.

1. The fact that a claimant has attained the age of 65 years does not entitle him to pension, per se, under section 2 of the act of June 27, 1890, regardless of his mental or physical condition, and such was not the view expressed in the case of Francis Frank (9 P. D., 68); but the evidence in this case disclosing the fact that claimant is by trade a pattern maker, and that by reason of age, disease of heart, limitation of motion in knee and shoulder, enlarged veins of leg, and stiffness and limitation and atrophy of hand he is unable to follow said occupation, the action rejecting his claim was error, and is reversed. (Charles Stone, 8 P. D., 477, and William Featherly, 9 P. D., 106.)

J. Louis Will 179

Cause of Disability.

2. The certificate of medical examination, made under appellant's claim for increase, shows that his loss of vision in both eyes is due to intraocular changes caused by a high degree of myopia, which can not be accepted as due to his military service.

Adolph Becker 185

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Degree of Disability—Act June 27, 1890.

3. The fact that the claimant was not disabled in a pensionable degree from the causes alleged is not a good ground for rejecting his claim under the second section of the act of June 27, 1890, if it appears that he was so disabled from other causes not alleged.

Archie C. Winfrey 38

4. Appellant's disability, resulting from disease of left foot and leg, evidenced by marked swelling of entire left lower extremity in marked contrast with its fellow, simulating elephantiasis, due to local edema, right thigh measuring 17 inches, left 18¼ inches; right lower thigh 15 inches, left 16 inches; knees 15 inches; right calf 12, and left 17 inches; right ankle 9 inches, left 15; right arch of foot 8½, and left 10 inches, existing in a degree rendering him unable to earn a support, he was entitled to a rate of $12 per month from October 26, 1899, and action is reversed.

Lee K. Janney 505

DISEASE OF HEART.

See PATHOLOGICAL SEQUENCE, 462.

DISCHARGE.

See also DEATH CAUSE, 440; SERVICE, 206.

1. In 1891 pension was allowed under the act of June 27, 1890, when the practice required only a final honorable discharge from the service; therefore the desertion of an applicant for pension under said act from his first service was no bar to pension. The practice having been changed so as to require an honorable discharge from all service contracted to be performed during the war of the rebellion, pensioner's name was properly dropped from the rolls on the ground that he was a deserter.

Jerome Woodin, alias Frank Allen 13

DISLOYALTY.

Bars Payment of Accrued Pension.

1. Pension having erroneously been granted to the soldier under the act of June 27, 1890, he having aided and abetted the late rebellion against the authority of the United States, section 4716, Revised Statutes, positively prohibits the payment of the pension that may have accrued to him to the date of his death to his widow.

Anna M. Winkler (widow) 241

Facts Showing Disloyalty.

2. Claimant, while a prisoner of war at Andersonville, Ga., having enlisted in the Confederate service in February, 1865, is barred from pension by reason of the provisions of section 4716 of the Revised Statutes, notwithstanding his allegation (uncorroborated) that his enlistment was merely a subterfuge to enable him to escape to the Union lines, which he did in April, 1865, it being held that said enlistment and service was voluntary. (Milo B. Ousterhout, 7 P. D., 270.)

Charles F. M. Guernsey 64

Facts not Showing Disloyalty.

3. The record shows claimant as "transferred" to Colonel O'Neill from Andersonville, Ga., a rebel recruiting officer. There is no record or evidence in the case of enlistment in the Confederate States Army or of any act on claimant's

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part of aiding or abetting the rebellion: *Held*, The action of dropping was unlawful. One has an undoubted right to escape the rigors of prison life in any way that presents itself, as well outside as inside the prison, if in so doing he does not aid or abet the enemy. The opinion in the case of Milo Ousterhout (7 P. D., 270) is not in conflict with such doctrine.

John H. Kimball..... 124

4. Volunteering to build larger stockades for the better accommodation of Union prisoners was not volunteering to aid the rebellion.

The record showing the transfer of a Union prisoner to Colonel O'Neill, rebel recruiting officer, will not raise a presumption of an enlistment in the Confederate Army, but is sufficient to raise a presumption of aiding and abetting the rebellion; but the proof in this case showing that claimant neither enlisted in the Confederate Army nor performed service of any kind in aid of such rebellion, such presumption of aiding and abetting the rebellion against the authority of the United States is rebutted, and the decision in this case of October 10, 1900, is not in conflict with the cases of Milo Ousterhout (7 P. D., 270); Russel S. Cole (4 P. D., 141); John S. McCoy (5 P. D., 369); William Hedgspeth (1 P. D., 245), and Charles F. M. Guernsey (11 P. D., 64).

John H. Kimball..... 136

5. The testimony filed by the claimant tending to show that he did not voluntarily engage in or aid or abet the late rebellion, special examination is directed in order to satisfactorily and fully determine the facts, the records of the War Department showing enlistment in the Confederate service and desertion two months, probably, later.

Lewis Riddle..... 252

6. A prisoner of war who, while under actual duress and in well-grounded fear of his life, is forced by his captors to engage in mounting field guns and building fortifications for the use of such captors in active hostile operations, and is disabled while so engaged, without any free will on his part in such disloyal participation, is pensionable on account of such disability.

Lorenzo Pruett..... 290

7. The record of the War Department showing that claimant, while a prisoner of war in Andersonville, Ga., in February, 1865, was "transferred to Colonel O'Neill, rebel recruiting officer," in the absence of proof showing enlistment in the rebel army or performance of service therein, does not establish the fact that he aided or abetted the late rebellion against the authority of the United States.

James H. Rainey..... 327

DIVISION OF PENSION, ACT MARCH 3, 1899.

See also CONSTRUCTION, 77 AND 90.

Construction of Act.

1. To entitle the deserted wife of an invalid pensioner to receive one-half the pension of her husband under the provisions of the act of March 3, 1899, it must appear that she has been deserted by said pensioner for a period of over six months subsequent to the date of the passage of said act, said act being wholly prospective and not retroactive in its operation and character. (See case of Mary Ann Rothery *v.* Henry N. Rothery, 11 P. D., 77.) The application of Catharine Richards under the act of March 3, 1899, for one-half the pension of this appellant, James J. Richards, having been filed in the Pension Bureau on April 15, 1899, less than six months from the date of the passage of said act, was premature, ineffective, and void, no legal rights whatever having accrued to her on said date under the provirions of said act.

Catharine Richards v. James J. Richards..... 90

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2. The word desertion in the act of March 3, 1809, is used in its general legal sense and means the willful withdrawal of the pensioner from his wife, or his voluntary refusal to renew a suspended cohabitation without legal justification. Rothery v. Rothery (11 P. D., 77); Richards v. Richards (ibid. 90); Henry N. Rothery (ibid., 255). The evidence in this case shows that pensioner did not willfully desert claimant, but that his separation from his wife is due to her own conduct toward him, and is in accordance with her wish.

Mary A. Rothery v. Henry N. Rothery 377

Notice of Appeal.

3. In cases of contest over the division of pension under the act of March 3, 1899, the appellee is entitled to notice of the appeal and a copy thereof and reasonable time in which to file a brief and argument in support of the Bureau action appealed from.

Emily Ellis v. Leroy Ellis 288

Pension Unlawfully Withheld.

4. It having been decided that upon a proper construction of the law and upon the evidence in the case the division of the pension and the payment to the wife of this pensioner, by virtue of the act named, were erroneous and without proper warrant of law, the refusal to restore to him the amount of which he was deprived is likewise illegal, and it is directed that such amount shall be paid to him.

Henry N. Rothery 255

Pensioner's Desertion of his Wife.

5. It appearing from soldier's own testimony that he deserted his wife and that she was a woman of good moral character; and it further appearing that said wife is in necessitous circumstances, the action of the Bureau of Pensions in paying to said wife one-half of the pension he was drawing was proper and is affirmed.

Mary C. Slagle (widow) 260

Pensioner Divorced.

6. It appearing from a duly certified copy of the court record that pensioner was divorced from the claimant, who seeks a division of his pension under the act of March 3, 1899, prior to filing such claim, the record also showing that said court acquired jurisdiction over said alleged deserted wife in the suit for said divorce, she was not pensioner's wife and is not entitled to receive one-half of his pension.

Eliza McKee v. James H. McKee 494

DIVORCE.

See DECREE, 499; DIVISION OF PENSION, 494; JURISDICTION, 226 AND 406; MARRIAGE, 271 AND 488.

DROPPING.

See DESERTION, 362.

DURESS.

1. A prisoner of war who, while under actual duress and in well-grounded fear of his life, is forced by his captors to engage in mounting field guns and building fortifications for the use of such captors in active hostile operations, and is disabled while so engaged, without any free will on his part in such disloyal participation, is pensionable on account of such disability.

Lorenzo Pruett 290

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EMANCIPATION PROCLAMATION.

1. Appellant, prior to the time of her alleged marriage to soldier, married one William Norris, in 1864, who was at the time a soldier in the United States Army, stationed at Portsmouth, Va., in territory in possession of the United States forces, in which the President's emancipation proclamation of January 1, 1863, was effective, and claimant was also in said territory, serving with the United States forces as laundress, the ceremony of marriage being performed by the chaplain of soldier's regiment. As it is shown that said Norris was still living at the time of claimant's alleged marriage to Smith, and no divorce being shown, said marriage was void.

Rose E., alleged widow of Israel Smith 443

ENLISTMENT.

See SERVICE, 240.

ESTOPPEL.

Evidence. Former Statements.

1. The claimant is shown to have separated from the soldier shortly after his return from the Army, and in 1866 (while the soldier was still living) married one A. J. Pebbles, with whom she lived until he abandoned her in 1880. The soldier died in 1871. She alleged that she had heard that the soldier was dead before she married Pebbles, but learned that he was alive some time afterwards—about a year before his death: *Held*, That by her marriage to Pebbles in 1866 and subsequent conduct she is estopped from claiming pension as the widow of the soldier.

Phebe Ann Coburn, now Robbins (alleged widow) 403

2. Claimant herein swore, in 1864, that soldier was married to one Sarah Hutchinson, and that she was present at the ceremony. By reason of such statements, the Government granted pension to said Sarah and paid it to her during her lifetime, and thereafter to her children during their pensionable minority: *Held*, Claimant is estopped from now setting up the fact that she, and not Sarah, was the wife.

Clara M. Bennett, alleged widow of William M. Covert 195

EVIDENCE.

See also AID AND ATTENDANCE, 473 AND 503; DISLOYALTY, 124, 136, 327; DIVISION OF PENSION, 377; ESTOPPEL, 195; FEE, 215; FRAUD AND MISTAKE, 200; INCREASE, 51; INCURRENCE, 516; JURISDICTION, 406 AND 420; LINE OF DUTY, 84 AND 191; MARRIAGE, 66, 131, 139, 144, 158, 181, 204, 212, 234, 320, 339, 427, 443; NOTICE, 523 AND 524; PATHOLOGICAL SEQUENCE, 388; REIMBURSEMENT, 308; RERATING, 299.

Attorney, Presumption as to.

1. After the lapse of several years from the date of an action of the Bureau adjudging that an attorney is entitled to a fee, it will be presumed, when it appears that said attorney performed the material service necessary to earn a fee, that he observed the rules of practice as regards mere formal service.

Edward W. Stephens 215

Death, Presumption as to.

2. The soldier abandoned his family in 1882 in the city of Philadelphia, Pa., without any warning or previous intimation of his purpose, and remained in said city for two years thereafter without communicating with his wife, his mother, or other relatives: *Held*, That his absence from his home and family is not unexplained, and that there is no reason for presuming his death.

Mary E. Burke (alleged widow) 197

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3. Claimant's first husband left her about the year 1856, without any ostensible reason except to go up the Wabash River, and has never been heard of by his relatives and friends since. There is no evidence in the case that would justify the conclusion that said husband intended to forsake, renounce, or relinquish his concern or interest for said claimant, and it is held that under the act of March 13, 1896, the facts warrant the presumption that said first husband was dead at the date of claimant's marriage to soldier, ten years after the departure of said first husband, and that said marriage was valid and she is his legal widow.

4. Where no record of deaths is in existence in a particular jurisdiction, testimony of two credible witnesses as to the date of death of a person, giving good reasons for fixing a certain date as the date of such person's death, will be accepted as sufficient proof of the date thereof.

Wesley Buckler et al. (minors) 234

5. The date of the soldier's death being material in a claim by an alleged widow for his accrued pension, it must be satisfactorily established by distinct proof, and may not be established by general presumption merely, under the rule as to presumption of death from seven years' unexplained absence. (Davie r. Briggs, 97 U. S., 628.)

Mary J. Schrater (widow) 501

Life, Presumption as to.

6. The claimant having proved the fact of her marriage to the soldier according to the law of the State of Illinois, and cohabited with him as his wife from the marriage to the date of his death sixteen years afterwards, her pensionable status was established. A mere presumption of life of a prior husband can not prevail against the presumption of the innocence of parties who enter the marriage relation according to legal forms.

Esther A. Palmer (widow) 320

Disloyalty, Proof as to.

7. The record of the War Department showing that claimant, while a prisoner of war in Andersonville, Ga., in February, 1865, was "transferred to Colonel O'Neill, rebel recruiting officer," in the absence of proof showing enlistment in the rebel army or performance of service therein, does not establish the fact that he aided or abetted the late rebellion against the authority of the United States.

James H. Rainey 327

8. Volunteering to build larger stockades for the better accommodation of Union prisoners was not volunteering to aid the rebellion. The record showing the transfer of a Union prisoner to Colonel O'Neill, rebel recruiting officer, will not raise a presumption of an enlistment in the Confederate army, but is sufficient to raise a presumption of aiding and abetting the rebellion; but the proof in this case showing that claimant neither enlisted in the Confederate army nor performed service of any kind in aid of such rebellion; such presumption of aiding and abetting the rebellion against the authority of the United States is rebutted, and the decision in this case of October 10, 1900, is not in conflict with the cases of Milo Ousterhout (7 P. D., 270), Russel S. Cole (4 P. D., 141), John S. McCoy (5 P. D., 369), William Hedgspeth (1 P. D., 245), and Charles F. M. Guernsey (11 P. D., 64).

John H. Kimball 136

Estoppel.

9. Claimant herein swore in 1864 that soldier was married to one Sarah Hutchinson, and that she was present at the ceremony. By reason of such statements the Government granted pension to said Sarah and paid it to her during her life-

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time and thereafter to her children during their pensionable minority: *Held*, Claimant is estopped from now setting up the fact that she, and not Sarah, was the wife.

Clara M. Bennett (alleged widow of William M. Covert) 195

Divorce, Presumption as to.

10. Soldier married Martha Pinkney in 1841, and they lived together as husband and wife until a short time before the civil war, when he separated from her. He married claimant in June, 1871, and also had a second marriage ceremony performed in 1888. Martha, the first wife, died June 22, 1897, and the soldier died November 30, 1897. No evidence of a divorce between soldier and his first wife, Martha, is shown, but it is held that the presumption is, in the absence of proof to the contrary, that said soldier had been divorced from his first wife at the time of his second marriage to claimant. (Citing Jennette Burton, 9 P. D., 31; Hull *v.* Rawles, 26 Miss., 471; Holmes *v.* Holmes, 6 La., 463; Blanchard *v.* Lambert et al., 43 Iowa, 228; Carroll *v.* Carroll et al., 20 Texas, 731, and Patterson *v.* Gaines, 6 Howard, 550.)

Louisa C. Germain (widow) 66

11. There is no conflict between the decisions in the Germain and Orr cases. In the Germain case it is held that the presumption was, in the absence of proof to the contrary, that soldier had been divorced from his first wife at the time of his second marriage to the claimant, but such presumption is rebuttable. In the Orr case the presumption of divorce was rebutted by the evidence of the first wife and the records of the court showing that no divorce had been procured as claimed.

Louisa C. Germain and Mary C. Orr 131

Marriage, Presumption as to.

12. The claimant married the soldier in 1883, in the State of Illinois. Her former husband had been absent for a period much greater than seven years. His absence was continuous and unexplained, and no intelligence of his existence has ever been received: *Held*, The presumption is in favor of the validity of the second marriage.

Mary Coburn (widow) 43

13. There being nothing whatever in the evidence tending to show this soldier was ever married prior to his formal marriage to claimant in 1886, at which time he was 66 years of age, and the testimony showing that from the time of his discharge from service in 1864 until such marriage he was always considered a single man, her marriage to the soldier must be presumed to have been valid, and the burden of proof of its invalidity is upon the Government.

Augusta M. Koschwitz (widow) 102

14. The claimant being unable to prove by the testimony of personal acquaintances that she was never married prior to her marriage to the soldier, or to furnish any evidence of the death of the soldier's first wife except a sworn statement made by the soldier himself less than a year before his death, but all the known facts, as well as the presumptions of law, being favorable to the validity of her said marriage, it is held to have been a valid marriage.

Mary M. A. Wood (widow) 158

15. The evidence shows that the soldier had, at the time of his formal marriage to this claimant in 1874, a living and undivorced former wife, who died in 1892, having been insane since 1860: *Held*, Said marriage in 1874 was invalid and void, and a valid marriage subsequent to the death of his lawful wife in 1892, his own death occurring in 1896, is not presumable from the circumstances shown.

Elizabeth Henderson (alleged widow) 204

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16. There being no proof or facts warranting the presumption of a prior marriage by the soldier, and the undisputed evidence showing that claimant and soldier lived and cohabited together as man and wife for eleven years in the State of Louisiana, the law of that State would presume them married, and the claimant is therefore entitled to pension as the lawful widow of the soldier.

Minna Wilson (widow) 339

Marriage, Proof of, under Section 4705, R. S.

17. A claimant who relies upon the rule of evidence provided in section 4705, Revised Statutes, must show either that she lived with the soldier up to date of enlistment, when the latter died in the service, or, if otherwise, that she lived with him up to the date of death.

Lucinda Harris (alleged widow) 181

Marriage, Proof of, in Oregon.

18. Under the civil code of Oregon, as construed in the case of Murray *v.* Murray (6 Or., 26), "when it is shown by evidence that a man and woman are living together and cohabiting as man and wife, and are in the community reputed and received in society as such, it is sufficient prima facie to prove the marriage in a civil action or proceeding."

Sarah E. Manwell (widow) 427

Marriage, Sufficient Proof of.

19. Claimant's marriage to the soldier is shown by evidence of a ceremony and cohabitation. The only evidence of a prior marriage is the testimony of his sister and a friend, to whom he wrote or disclosed that he had married a girl in a seaport while he was pursuing the occupation of a sailor. His mere declaration, without other proof, is not competent to establish such a marriage to the prejudice of the rights of this claimant, and on this point her legal widowhood is considered established.

Carrie Peterson (widow) 139

20. Appellant was married to one David King in 1852, in Scotland. Between 1855 and 1856 said King came to the United States, leaving his wife in Scotland; thereafter he sent for her, and in July, 1857, she joined him in Cohoes, N. Y., where they lived as man and wife until October of that year, when, on account of the closing of the mill in which he was employed, he left home for the purpose of procuring work and has never been seen or heard from since by appellant. In December, 1865, claimant married James Notman, who died May 26, 1892, leaving her without property or means of support: *Held*, That claimant was the legal widow of James Notman under the laws of New York, and that her claim as such is sufficiently proved under the law as stated in the case of Davie *v.* Briggs (97 U. S., 628), and that under the evidence she is entitled to pension as the widow of said James Notman under the act of June 27, 1890. The cases of Lavinchia L. Salisbury (7 P. D., 247) and Spicer *v.* Spicer (16 Abb. Prac. Repts.) referred to and distinguished.

Annie Notman (widow) 212

Notice, How Proved.

21. Due proof of service may be shown by a written acceptance of service by the appellee or her attorney, or a registry return receipt, signed by the appellee or her attorney, and forwarded by the appellant or his attorney with an affidavit that on a certain day a copy of the appeal or proposed appeal has been mailed in a registered letter, postpaid, to the appellee at a certain named post-office, naming it, and that the card was returned in acknowledgment of the receipt of such letter; or an affidavit showing that on a certain day and place a copy of the appeal was personally delivered to the appellee or her attorney of record.

Sophia M. Loughry v. John Loughry 523

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22. An affidavit stating that a copy of the appeal attached thereto had been sent through the mail to the address of the claimant as given by the Pension Bureau is not due proof of service of the appeal, as the proof should show that the same was mailed by registered letter, and that the return registry receipt attached to such proof was the receipt for the registered letter containing a true, full, and complete copy of said appeal and the notice of appeal.

Eliza J. Conover v. William Conover 524

Of Family Physicians v. Opinion of Medical Referee.

23. It is contended in a motion for the reconsideration of departmental decision of August 11, 1900, in the case at bar, that the rules laid down in the case of the widow of Charles F. Brown (3 P. D., 92), and in the case of Minnie Shuttleworth (3 P. D., 50), respectively, should govern in this case: *Held*, That in the rules laid down in the cases cited—to the effect that the medical referee's opinion must "have some evidence to support it, and some facts proven upon which to base it," before it can be accepted in preference to "the diagnosis made and the opinion expressed" by the attending physician of a soldier in his last illness as to the actual cause of the latter's death—it was not the intention of the Department to place any restrictions upon the official acts of the medical officers of the Bureau which should not equally apply to the medical evidence filed in such cases, and that inasmuch as no other good or sufficient reason is shown why former departmental action in the premises should be receded from the pending motion in the case is overruled.

Margaret Lalone (widow) 301

Prior Service, Presumption as to.

24. The rejection of the claim on the ground of claimant's inability to prove that the soldier was not in the military or naval service of the United States prior or subsequent to the term of service on which said claim is based, when the weight of the evidence and reasonable inference from known facts are against the probability that the soldier was in the service at any other time than as stated, was error, as the claimaint should be given the benefit of any remaining doubt on that point.

Johanna Dorgan (widow) 437

Prior Soundness, Presumption as to.

25. When prior soundness is shown, and a reasonable degree of proof that the injury was sustained in the service is furnished, there being no circumstances which would raise a suspicion that it was incurred outside the line of duty, and such injury is shown to have existed at discharge, it will be presumed that the injury was incurred in line of duty.

William D. Mitchell 84

Record, Rebuttal of.

26. The evidence to overcome a positive adverse record made from statements of a claimant should be clear and convincing.

Ransom J. Chase 483

Vicious Habits, Presumption as to.

27. Vicious habits can not be presumed in case of an injury unless there is something concerning the nature or character of the injury which warrants such a presumption, or unless the evidence shows certain facts which are sufficient to raise such a presumption. Where neither the nature of the injury nor the evidence adduced raises such a presumption, the testimony of two credible witnesses to the effect that the claimant is now a man of good habits, and that they do not believe, and have no reason to believe, that the said injury was due to vicious habits, will be considered as sufficient to meet the requirements

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of the statute, provided, always, that the claimant is a man of good repute for veracity, and that he shows that no better evidence is obtainable by him.
Benjamin F. Peterman 344

EXAMINING SURGEONS.

See AID AND ATTENDANCE, 503; RATE, 317.

EXECUTION.

See DECLARATION, 210.

EXPERTS.

See JURISDICTION, 348.

FEE.

See also FEE AGREEMENTS; ATTORNEYS, 49, 490, and 492; DEPENDENT PARENTS, 247.

Dependent Parent's Claims.

1. An applicant for a dependent parent's pension may, if he or she so elects, make and prosecute a claim under the provisions of section 4707, Revised Statutes, without regard to the provisions of section 1 of the act of June 27, 1890. So much of the decision in the case of Elizabeth Darling (10 P. D., 244 and 299) as denies the existence of such a right subsequent to the passage of the act of June 27, 1890, is overruled.
Kathryne A. Ratcliffe (mother) 171

2. Where a dependent parent's claim was filed and prosecuted wholly under section 4707, Revised Statutes, and calls were made by the Bureau of Pensions for evidence of dependence at the date of the soldier son's death, and the proof furnished establishes dependence at date of soldier's death, and the provisions of section 1 of the act of June 27, 1890, have in no manner been invoked, it is error to issue the certificate, upon the allowance of the claim, under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890. In such a case the attorneys prosecuting the claim should be certified such fee as agreed upon, evidenced by properly executed duplicate fee agreements filed in the claim, not exceeding $25.
Kathrina Blitch (mother) 247

3. Under the fourth section of the act of June 27, 1890, fee of but $10 can be paid an attorney for services in a claim filed under any of the provisions of said act; and the question as to whether a dependent parent's claim was properly granted under the provisions of section 1 of said act can not be decided upon appeal as to a question of fee, but the remedy must be sought in an application to the Commissioner of Pensions for a readjudication of a claim and a reissue under the general law as it existed prior to the passage of the first section of the act of June 27, 1890.
Mary Horan (mother) 514

Material Service, Presumption as to.

4. After the lapse of several years from the date of an action of the Bureau adjudging that an attorney is entitled to a fee, it will be presumed, when it appears that said attorney performed the material service necessary to earn a fee, that he observed the rules of practice as regards mere formal service.
Edward W. Stephens 215

Merit and Fee Appeal.

5. The action of the Bureau in a claim for pension upon its merits can not be reviewed upon appeal from action of the Bureau in the matter of fee.
James Hughes (father) 325

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Minor's Claim, Whole Fee to be paid.

6. In a minor's claim for pension, when, upon issue of certificate to allow pension, payment of the share of one claimant is withheld under the instructions of the Secretary of the Interior dated January 14, 1901, the entire fee of the attorney prosecuting the case shall be paid pro rata from the shares of the other claimants to whom pension is paid upon and at the time of said issue.
Minors of David G. Miller 496

No Fund—No Fee.

7. Where there is no fund from which a fee can be paid, action refusing to certify a fee is proper.
Annie C. Cashner (widow) 149

Prima Facie Case.

8. Where an attorney has prima facie established a claim for pension, and no call for additional evidence has been made, he has earned the fee, though subsequently to his death another attorney filed evidence for which the Bureau could have issued a call.
Annie E. Myers (widow) 392

Rerating.

9. In the absence of valid fee agreements, an attorney is entitled to a fee of $10 for his services for the successful prosecution of a claim for rerating.
Samuel Bennison (claimant) 202

FEE AGREEMENTS.

See also APPEAL, 519; FEE, 202 AND 514; PRACTICE, 325.

Increase—Act June 27, 1890.

1. The fee in a claim for increase under the act of June 27, 1890, regardless of the cause upon which said claim is based, is governed by the fourth proviso of the pension appropriation act of March 3, 1891, and can not exceed $2.
John H. Afflerbach 508

Minor Contesting against Minors.

2. A claim for pension under the general law in behalf of one as minor child of a soldier, when antagonistic to a claim in behalf of others as minor children of the same soldier to whom the entire pension has been paid, is an original claim for pension within the meaning of the act of July 4, 1884, and when valid fee agreements are filed in such a claim the law directs that they shall be recognized.
Minor of Henry Elberson (claimant) 150

Refusal to Recognize Agreements by Commissioner.

3. Upon appeal the papers in a claim will not be reviewed to determine whether the Commissioner of Pensions properly refused to recognize articles of agreement in a claim of difficulty and trouble, unless the facts as recited on appeal present such showing as would warrant the belief that gross injustice has been done in refusing to recognize articles of agreement.
Annie Higgins (widow) 519

FRAUD AND MISTAKE.

See also REIMBURSEMENTS, 308 AND 395.

Clerical Error.

1. While it is evident that the allowance which it is proposed to recover was due to a clerical error, yet as, from an examination of the evidence, it is doubtful whether the pensioner was not justly entitled to what he received, it is held that recovery by withholding current pension should not be enforced.
Joseph B. Wilson 308

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Fraud on Part of Claimant.

2. The evidence obtained by a special investigation having clearly shown that the diseases of which the soldier died existed prior to his enlistment, and that the claimant was in a position to know of their existence, it is held that her claim for pension on the ground that said diseases originated in the service was fraudulent, and that the pension under the act of June 27, 1890, was properly withheld for the purpose of recovering the amount paid upon said claim.
Sarah M. Decker (widow) 200

GUARDIANSHIP.

See also JURISDICTION, 351.

1. The guardian of a pensioner is the agent of the United States for the proper expenditure of pension money in his hands, irrespective of the duties devolved upon him by the State law.
2. A pension fund granted to a pensioner, in the hands of a guardian, is in transitu until it reaches its final destination, and is controlled only by the United States; and the Commissioner of Pensions is invested with the discretionary power necessary to the proper administration of the pension laws, and guardians holding pension funds are subject to his direction both before and after the death of their wards.
3. All funds which have accumulated in the hands of a guardian by operation of the pension law, and have not been paid to the pensioner or expended in accordance with law in his behalf, are in the nature of accrued pension.
4. An unexpended pension fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner, and is an accrued pension.
Commissioner of Pensions 351

HUSBAND AND WIFE.

1. The appellant obtains a comfortable support from a farm on which he resides with his wife and son, the title to said farm being in the wife: *Held*, While section 6295, statutes of Michigan, allows the wife to hold and convey property free from interference and joinder by her husband, yet the said statutes do not deprive the hushand of the enjoyment and use of the wife's real estate, a right belonging to him under the common law.
Thomas Garner (father) 297

HONORABLE DISCHARGE.

See DISCHARGE; DESERTION, 362.

INCREASE.

See also AID AND ATTENDANCE, 503; ATTORNEYS, 429 AND 492; FEE AGREEMENTS, 508; LINE OF DUTY, 191; PRACTICE, 122 AND 451.

Third Grade.

1. The objective conditions, due to rheumatism and disease of heart, and the sequelæ thereof, described in the certificate of the medical examination held August 2, 1899, in pursuance of the claim for increase filed January 28, 1899, show—in the judgment of the Department—the existence at that time of a degree of disability fully equivalent to the loss of a hand or foot, for purposes of manual labor; and it is therefore *held* that the allowance of the third-grade rate from the date of the certificate of the said medical examination was and is fully warranted.
Calvin A. Hutchinson 51

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Act of January 5, 1893.

2. The increase of pension provided by the act of January 5, 1893, for survivors of the Mexican war who have been pensioned under the provisions of the act of January 29, 1887, or the act of March 3, 1891, should be made to commence from the date, subsequent to the date of the approval of the act granting said increase, at which it shall have been established by the proof that the conditions of disability and destitution existed which are designated in said act as entitling such pensioners to the increase of pension therein provided.

The decisions of this Department of May 19, 1894, in the case of Collins, alias Crossweight (L. B. 125, p. 82); June 8, 1894, in the case of Harmon (L. B. 129, p. 7); September 13, 1895, in the case of Hope (L. B. 182, p. 400); and May 7, 1898, in the case of Levan (9 P. D., 322), and all similar decisions and holdings, are hereby overruled and set aside, and Order No. 231 of the Commissioner of Pensions is disapproved and abrogated.

Robert Markwood 380

IMPEDIMENT.

See MARRIAGE AND DIVORCE, 97, 114, AND 266.

INCUBATION.

See ORIGIN, 329.

INCURRENCE.

1. The prior soundness of the claimant being well established, and it being shown that he performed active duty of the most arduous character, immediately following which he was taken sick with a congestive chill and sent to hospital, where after three months' treatment he was discharged the service on account of inguinal hernia and synovitis of the kneejoint, and there being no intimation that he was at any time outside the line of duty, it will be presumed that his alleged double hernia was the result of his military service in line of duty.

Francis Baltzer 516

INDIAN WARS.

1. The Sabine Indian war not being one of the wars named in the act of July 27, 1892, the soldiers who served therein are not entitled to pension under said act.

R. G. English 177

INDIANA LAWS.

See MARRIAGE, 271.

INTERLOCUTORY DECREE.

See DECREE.

IOWA.

See MARRIAGE, 73.

JURISDICTION.

See DECLARATIONS, 210; DIVISION OF PENSION, 494; MARRIAGE, 271.

As to Declarations.

1. Soldier executed his declaration and mailed it to the Commissioner of Pensions, but died six days prior to the date of its receipt at the Pension Bureau: *Held*, A pension claim is not pending until the date of the filing of the declaration,

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for the Commissioner of Pensions attains no jurisdiction until the declaration is filed. The Commissioner of Pensions could have no jurisdiction over a dead person, and the filing of said declaration was of no force or effect.

Asa H. Dilley 257

2. A declaration for pension is of no force or effect whatever until filed in the Bureau of Pensions.

3. The actual mailing of a declaration for pension, addressed to the Commissioner of Pensions, is not sufficient proof that the same was ever filed in the Bureau of Pensions; neither does such mailing raise any presumption that said declaration had been filed in said Bureau.

Anthony O'Grady, alias John Davis 420

4. The declaration purports to have been made on August 10, 1888, before the deputy clerk of the circuit court of Macomb County, Mich., but the evidence shows that the same was executed in Grand Traverse County, of said State: *Held*, The declaration is invalid.

Samuel Berry 210

As to Marriage and Divorce.

5. The appellant was married to the deceased soldier in Hamilton County, Ind., in 1880, and lived with him as his wife until his death in 1896. She was previously married, in 1869, to one Henry Curtner in Ohio. In 1898 she obtained a decree in the circuit court of Hamilton County, Ind., annulling and vacating her marriage to Curtner on the ground of his insanity, and declaring her marriage to the soldier valid, legal, and binding under the laws of Indiana: *Held*, That said court having had complete jurisdiction of the subject-matter and the parties, its judgment and decree declaring said marriage to the soldier legal and valid under the laws of Indiana is binding and conclusive, and establishes the legal status of the appellant in that State as the lawful wife of the soldier, and she should be accepted as his widow for pensionable purposes in accordance with the provisions of the second section of the act of August 7, 1882.

Mary J. Volger (widow) 271

6. The widow's claim was rejected on the ground that her husband obtained a divorce from her in the State of Indiana while she resided in Arizona. The transcript of the record fails to show affirmatively that a copy of the summons in the divorce proceedings was mailed to her, although her post-office address was known. This statutory requirement being omitted, it is fatal to the jurisdiction of the court.

Annie M. Shipp (widow) 226

7. The decree of divorce obtained by the soldier in the State of Arkansas in 1879 against the claimant, who was in the State of Illinois, is void for the reason that the statutory requirement that the warning order should be published was not complied with.

Elizabeth Williamson 406

Of Commissioner over Medical Examinations.

8. The third subdivision of section 4 of the act of July 25, 1882, confers discretion on the Commissioner of Pensions, in the exercise of which he may order a claimant to be examined by an expert without an examination before a full board of examining surgeons.

Samuel S. Bowman 348

Of Commissioner over Pension Fund in Hands of Guardian.

9. The guardian of a pensioner is the agent of the United States for the proper expenditure of pension money in his hands, irrespective of the duties devolved upon him by the State law.

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10. A pension fund granted to a pensioner, in the hands of a guardian, is in transitu until it reaches its final destination, and is controlled only by the United States; and the Commissioner of Pensions is invested with the discretionary power necessary to the proper administration of the pension laws, and guardians holding pension funds are subject to his direction both before and after the death of their wards.
11. All funds which have accumulated in the hands of a guardian by operation of the pension law, and have not been paid to the pensioner or expended in accordance with law in his behalf, are in the nature of accrued pension.
12. An unexpended pension fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner, and is an accrued pension.
13. The act of March 2, 1895, is the law of distribution of accrued pension of a deceased pensioner, and applies to the fund in the hands of a guardian unexpended at the time of such pensioner's decease.

Commissioner of Pensions 351

KANSAS LAWS.

See MARRIAGE, 97.

LEAVE OF ABSENCE.

See LINE OF DUTY, 30.

LEGITIMACY.

See also MARRIAGE, 40, 278, AND 294.

Laws of Maryland.

1. Under the laws of Maryland slaves might legally marry, and the issue of their marriage was legitimate.

Samuel Tuttle (father) 278

Laws of Tennessee.

2. The evidence in this case shows that this appellant married the mother of the deceased soldier in the State of Tennessee in 1844, according to the custom of slaves; that the deceased soldier was born of said marriage in 1845, and was always known and acknowledged as the son of the appellant; that the appellant and the mother of soldier lived and cohabited together as husband and wife, and were universally so known and recognized from the date of their slave marriage until the death of the latter, in 1872; that they were so living together in the State of Tennessee on May 26, 1866, the date of the act of said State making said marriage legal and valid for all purposes, and legitimizing all the issue of such marriage. There is no competent or sufficient evidence in this case indicating that the appellant was not the father of the deceased soldier, and he should be accepted as such for pensionable purposes.

Reuben Burton (father) 294

Parents Must be Legally Married.

3. A minor child, to be pensionable, must be the child of a woman to whom the soldier, its father, was legally married, notwithstanding that soldier solemnly declared and recognized it to be his legitimate child.

Alleged minors of William Hartley 40

LIMITATION.

See FEE, 171; PRACTICE, 95 AND 112.

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LINE OF DUTY.

See also DISLOYALTY, 290; INCURRENCE, 516.

Absent from Command.

1. This appellant was granted leave of absence by his commanding officer to visit his family, with orders to return and report to his command on a certain day and at a designated place. In obedience to said orders he returned and reported at the place and on the day designated therein, but found that his command had moved on and was not at said place, which was occupied by the enemy, who attacked and wounded him: *Held*, That the appellant was in the line of duty when wounded under the foregoing circumstances.

William Smith 30

2. It appearing from the official record of this appellant's military service, and from the other evidence in the case, that at the date he incurred the disabilities in the service on account of which he was formerly pensioned he was in desertion from a prior term of service, and was at said time absent from his proper command without leave and not in the line of duty, he is not entitled to be restored to the pension roll under the present rulings and decisions of this Department. See cases of John Norton (9 P. D., 382) and widow of John Sullivan (10 P. D., 55.)

Lewis Rankin 373

3. Appellant's contract of enlistment in Company B, Thirty-fifth New York Volunteer Infantry, having expired by limitation long prior to the incurrence of the injury for which he was pensioned, the offense of desertion terminated with said contract of enlistment, and at the time of the incurrence of said injury he was no longer in desertion, but was in line of military duty under his second enlistment and occupied a pensionable status, and the action dropping him from the rolls because of desertion from his first service was error. (See case of John Norton, 9 P. D., 382.)

Henry P., alias Patrick H., Burns 332

Accidental wound.

4. The certificate of medical examination made under the claim for increase does not show that the disabilities from pensioned causes have increased. The evidence on file in the case shows that the newly alleged disability—gunshot wound of right ankle—was not incurred in line of duty, having been caused by the accidental discharge of a pistol carried by claimant at his own risk.

Pinckney Hopper 191

Killed Accidentally by Falling from Window.

5. Soldier was killed by a fall from a window at the hotel at which he was stopping just prior to his final payment and the disbandment of his command. It is held that his death was not due to his military service in line of duty.

Mary E. Parker (now Resdin), widow 103

Killed while Hunting.

6. The officer, father of this minor, having been killed by the accidental discharge of his gun while hunting by permission of the commanding officer of the post, not the consequence of any willful neglect or improper conduct on his part, his death is considered to have occurred in the line of duty, the commander of said post reporting that said officer at the time he was killed was considered on detached service. (See case of Margaret M. Hoffman, 9 P. D., 277.)

Minor of James S. Marsteller 55

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May be Presumed.

7. When prior soundness is shown and a reasonable degree of proof that the injury was sustained in the service is furnished, there being no circumstances which would raise a suspicion that it was incurred outside the line of duty, and such injury is shown to have existed at discharge, it will be presumed that the injury was incurred in line of duty.
William D. Mitchell 84

Retired Officer.

8. A soldier, retired after thirty years' service, can not be considered as still in the service for pensionable purposes without due proof of the origin of disability in line of duty. The service contemplated by the law is active service, and disability or death must be shown to be due thereto. Soldier having had syphilis in service and there being intervals between his enlistments, as well as four years of separation from active service after his retirement, can not be presumed to have contracted disease of urinary organs, which led to his death, in service and line of duty simply because his active service extended over thirty years. Definite proof of origin and continuance is necessary.
Catherine Meade (widow) 28

LOUISIANA LAWS.

See MARRIAGE, 339.

MARRIAGE AND DIVORCE.

See also ESTOPPEL, 195; EVIDENCE, 43 AND 102.

Impediment to Marriage.

1. A minor child, to be pensionable, must be the child of a woman to whom the soldier, its father, was legally married, notwithstanding that soldier solemnly declared and recognized it to be his legitimate child. It appearing that the deceased soldier had been lawfully married prior to his marriage to the mother of the above-named minor children, that said marriage was never dissolved by divorce, and that said first wife survived him and is at present in receipt of a pension as his widow, and that the mother of said minor children also survived the soldier and is now living, said minors have no title whatever to pension as minor children of the deceased soldier under the provisions of the pension laws. See case of alleged minors of Jonas W. Pulver (10 P. D., 227).
Alleged minors of William Hartley 40

2. Claimant's marriage to the soldier is shown by evidence of a ceremony and cohabitation. The only evidence of a prior marriage is the testimony of his sister and a friend, to whom he wrote or disclosed that he had married a girl in a seaport while he was pursuing the occupation of a sailor. His mere declaration, without other proof, is not competent to establish such a marriage to the prejudice of the rights of this claimant, and, on this point, her legal widowhood is considered established.
Carrie Peterson (widow) 139

3. The evidence shows that the soldier had, at the time of his formal marriage to this claimant in 1874, a living and undivorced former wife, who died in 1892, having been insane since 1860: *Held*, Said marriage in 1874 was invalid and void, and a valid marriage subsequent to the death of his lawful wife in 1892, his own death occurring in 1896, is not presumable from the circumstances shown.
Elizabeth Henderson (alleged widow) 204

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4. The claimant is shown to have separated from the soldier shortly after his return from the Army, and in 1866 (while the soldier was still living) married one A. J. Pebbles, with whom she lived until he abandoned her in 1880. The soldier died in 1871. She alleged that she had heard that the soldier was dead before she married Pebbles, but learned that he was alive some time afterwards—about a year before his death: *Held*, That by her marriage to Pebbles in 1866, and subsequent conduct, she is estopped from claiming pension as the widow of the soldier.

Phebe Ann Coburn, now Robbins (alleged widow) 403

5. Appellant, prior to the time of her alleged marriage to soldier, married one William Norris, in 1864, who was at the time a soldier in the United States Army, stationed at Portsmouth, Va., in territory in possession of the United States forces, in which the President's emancipation proclamation, of January 1, 1863, was effective, and claimant was also in said territory, serving with the United States forces as laundress, the ceremony of marriage being performed by the chaplain of soldier's regiment. As it is shown that said Norris was still living at the time of claimant's alleged marriage to Smith, and no divorce being shown, said marriage was void.

Rose E., alleged widow of Israel Smith 443

6. Claimant's marriage to the soldier in 1878, he having at the time a former wife living who was not divorced from him until 1896, was null and void, and as claimant was not and could not have been legally married to the soldier prior to the passage of the act of June 27, 1890, she can have no title to pension under said act by reason of the proviso to the third section thereof.

Drucilla Walker (widow) 488

Laws of California.

7. In the absence of consent the mutual assumption of marital rights, duties, and obligations can not, under the statutes of California, constitute marriage.

Rachel J. Sebastian (widow) 144

Laws of Indiana.

8. The appellant was married to the deceased soldier in Hamilton County, Ind., in 1880, and lived with him as his wife until his death in 1896. She was previously married, in 1869, to one Henry Curtner in Ohio. In 1898 she obtained a decree in the circuit court of Hamilton County, Ind., annulling and vacating her marriage to Curtner on the ground of his insanity, and declaring her marriage to the soldier valid, legal, and binding under the laws of Indiana: *Held*, That said court having had complete jurisdiction of the subject-matter and the parties, its judgment and decree declaring said marriage to the soldier legal and valid under the laws of Indiana is binding and conclusive, and establishes the legal status of the appellant in that State as the lawful wife of the soldier, and she should be accepted as his widow for pensionable purposes, in accordance with the provisions of the second section of the act of August 7, 1882.

Mary J. Vogler (widow) 271

Laws of Kansas.

9. The deceased soldier married the appellant by ceremony in the State of Kansas in 1875, at a time when he had a former wife living, who subsequently obtained a divorce from him in the State of Michigan in 1877, which facts were unknown to the appellant during the lifetime of the soldier. The appellant and the soldier lived together continuously as husband and wife in the State of Kansas, united in church membership as husband and wife, joined in the execution of deeds and conveyances as husband and wife, and were so recognized by their relatives, friends, and neighbors from and after the removal of the impediment to their marriage in 1877 up to the date of the soldier's death in 1898, a period

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of twenty-one years: *Held*, That under the laws of the State of Kansas, where the parties resided, a valid common-law marriage will be presumed to have been contracted by them after the removal of the impediment to their lawful union. (State *v.* Walker, 36 Kans., 297; State *v.* Hughes, 35 Kans., 626; State *v.* McFarland, 38 Kans., 664; Matney *v.* Linn, 59 Kans., 613; and Shorten *v.* Judd, 60 Kans., 73.)

Elizabeth Lockwood (widow) 97

Laws of Louisiana.

10. There being no proof or facts warranting the presumption of a prior marriage by the soldier, and the undisputed evidence showing that claimant and soldier lived and cohabited together as man and wife for eleven years in the State of Louisiana, the law of that State would presume them married, and the claimant is therefore entitled to pension as the lawful widow of the soldier.

Minna Wilson (widow) 339

Laws of Maryland.

11. Under the laws of Maryland, slaves might legally marry, and the issue of their marriage was legitimate.

Samuel Tuttle (father) 278

Laws of Massachusetts.

12. Claimant married soldier in 1856 and lived with him as his wife in the State of Massachusetts until his second enlistment, December 18, 1863. Not having heard from her said husband since 1864, and believing him to be dead, she married one Stewart, in the State of Massachusetts, in November, 1870, and lived and cohabited with him as his wife, in said State (both believing said marriage to have been legal) until his death, which occurred August 16, 1889. The soldier died in the Soldiers' Home in Chelsea, Mass., December 18, 1882: *Held*, That under the laws and decisions of the State of Massachusetts claimant's ceremonial marriage to Stewart was void, and that she was the wife of Sanders until his death in 1882, when she became his widow, but she and Stewart having lived together as husband and wife from the death of Sanders to the death of Stewart, each desiring to be and believing that they were husband and wife, they are deemed and held to have legally sustained the relation of husband and wife, and were such under the laws of that State from the death of Sanders to the death of said Stewart, when she became Stewart's lawful widow, and there being no pensionable period of widowhood between the death of Sanders and the time she became the wife of Stewart the rejection of her claim for pension on account of the death of Sanders was proper and is affirmed.

Emma C. Sanders, now Stewart (widow) 114

Laws of Mississippi.

13. It being shown that at the time of this claimant's formal marriage in 1876 to the soldier herein she had a former husband living and undivorced, such marriage was invalid and void; but as she and soldier then married in entire good faith, believing in her legal competency to marry, and cohabited thereafter continuously for twenty-one years, eleven of which were subsequent to the death of her former husband, each continuing until the soldier's death in the belief of their legal union, holding themselves out as man and wife, and being generally accepted as such, it is held that there was, under the laws of the State of Mississippi, where she and soldier resided at the time of his death, a lawful and valid marriage between them subsequent to the death of said former husband, and that she is, therefore, the soldier's lawful widow.

Minerva Brown (widow) 266

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Laws of Oregon.

14. Under the civil code of Oregon, as construed in the case of Murray v. Murray (6 Or., 26), "when it is shown by evidence that a man and woman are living together and cohabiting as man and wife, and are in the community reputed and received in society as such, it is sufficient prima facie to prove the marriage in a civil action or proceeding."

Sarah E. Manwell (widow) 427

Laws of Tennessee.

15. The evidence in this case shows that this appellant married the mother of the deceased soldier in the State of Tennessee in 1844, according to the custom of slaves; that the deceased soldier was born of said marriage in 1845, and was always known and acknowledged as the son of the appellant; that the appellant and the mother of soldier lived and cohabited together as husband and wife, and were universally so known and recognized from the date of their slave marriage until the death of the latter in 1872; that they were so living together in the State of Tennessee on May 26, 1866, the date of the act of said State making said marriage legal and valid for all purposes, and legitimizing all the issue of such marriage. There is no competent or sufficient evidence in this case indicating that the appellant was not the father of the deceased soldier, and he should be accepted as such for pensionable purposes.

Reuben Burton (father) 294

Presumption as to.

16. The claimant married the soldier in 1883 in the State of Illinois. Her former husband had been absent for a period much greater than seven years. His absence was continuous and unexplained, and no intelligence of his existence has ever been received: *Held*, The presumption is in favor of the validity of the second marriage.

Mary Coburn (widow) 43

17. Soldier married Martha Pinkney in 1841 and they lived together as husband and wife until a short time before the civil war, when he separated from her. He married claimant in June, 1871, and also had a second marriage ceremony performed in 1888. Martha, the first wife, died June 22, 1897, and the soldier died November 30, 1897. No evidence of a divorce between soldier and his first wife, Martha, is shown, but it is held that the presumption is, in the absence of proof to the contrary, that said soldier had been divorced from his first wife at the time of his second marriage to claimant. (Citing Jennette Burton, 9 P. D., 31; Hull v. Rawles, 26 Miss., 471; Holmes v. Holmes, 6 La., 463; Blanchard v. Lambert et al., 43 Iowa, 228; Carroll v. Carroll et al., 20 Texas, 731, and Patterson v. Gaines, 6 Howard, 550.)

Louisa C. Germain (widow) 66

18. There is no conflict between the decisions in the Germain and Orr cases. In the Germain case it was held that the presumption was, in the absense of proof to the contrary, that soldier had been divorced from his first wife at the time of his second marriage to the claimant; but such presumption is rebuttable. In the Orr case the presumption of divorce was rebutted by the evidence of the first wife and the records of the court showing that no divorce had been procured as claimed.

Louisa C. Germain and Mary C. Orr 131

19. The claimant being unable to prove by the testimony of personal acquaintances that she was never married prior to her marriage to the soldier, or to furnish any evidence of the death of the soldier's first wife except a sworn statement

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made by the soldier himself less than a year before his death, but all the known facts, as well as the presumptions of law, being favorable to the validity of her said marriage, it is held to have been a valid marriage.

Mary M. A. Wood (widow) 158

20. Appellant was married to one David King in 1852, in Scotland. Between 1855 and 1856 said King came to the United States, leaving his wife in Scotland. Thereafter he sent for her, and in July, 1857, she joined him at Cohoes, N. Y., where they lived as man and wife until October of that year, when on account of the closing of the mill in which he was employed he left home for the purpose of procuring work, and has never been seen or heard from since by appellant. In December, 1865, claimant married James Notman, who died May 26, 1892, leaving her without property or means of support: *Held*, That claimant was the legal widow of James Notman under the laws of New York, and that her claim as such is sufficiently proved under the law as stated in the case of Davie *v.* Briggs (97 U. S., 628), and that under the evidence she is entitled to pension as the widow of said James Notman under the act of June 27, 1890. The cases of Lavanchia L. Salisbury (7 P. D., 247) and Spicer *v.* Spicer (16 Abb. Prac. Repts.) referred to and distinguished.

Annie Notman (widow) 212

21. Claimant's first husband left her about the year 1856, without any ostensible reason, except to go up the Wabash River, and has never been heard of by his relatives and friends since. There is no evidence in the case that would justify the conclusion that said husband intended to forsake, renounce, or relinquish his concern or interest for said claimant, and it is held that under the act of March 13, 1896, the facts warrant the presumption that said first husband was dead at the date of claimant's marriage to soldier, ten years after the departure of said first husband, and that said marriage was valid and she is his legal widow. Where no record of deaths is in existence in a particular jurisdiction, testimony of two credible witnesses as to the date of death of a person, giving good reasons for fixing a certain date as the date of such person's death, will be accepted as sufficient proof of the date thereof.

Wesley Buckler et al. (minors) 234

22. The claimant having proved the fact of her marriage to the soldier according to the law of the State of Illinois, and cohabited with him as his wife from the marriage to the date of his death, sixteen years afterwards, her pensionable status was established. A mere presumption of life of a prior husband can not prevail against the presumption of the innocence of parties who enter the marriage relation according to legal forms.

Esther A. Palmer (widow) 320

Slave Marriages.

23. Claimant was one of four slaves who cohabited with one Melinda, also a slave, she bearing three of her pseudo husbands, including claimant, a child. The masters of Melinda and claimant refused to allow a ceremony of marriage to be performed: *Held*, The connection between claimant and Melinda was illicit, the evidence showing there was no mutual intent on their part to consummate a bona fide slave marriage.

24. The act of February 27, 1866, of the assembly of Virginia referred only to such colored persons who had undertaken and agreed, bona fide, to occupy the relation to each other of husband and wife. Mutual intent was a sine qua non to a bona fide moral matrimonial relation between slaves. The decision in the case of Daniel Bird (10 P. D., 105) is reaffirmed.

Frank Fitchett (father) 167

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25. A claimant who relies upon the rule of evidence provided in section 4705, Revised Statutes, must show either that she lived with the soldier up to date of enlistment, when the latter died in the service, or if otherwise that she lived with him up to the date of death.

Lucinda Harris (alleged widow) 181

Remarriage and Divorce.

26. Claimant, the widow of Samuel B. Kirkland, married Abraham Jackson in 1865; Jackson obtained a divorce, a vinculo, from her in 1881: *Held*, The divorce decree did not put her back, as to the rights under the law, as the widow of Kirkland. She forever destroyed her status as the widow of Kirkland when she entered into a valid marriage contract with Jackson.

Martha J. Kirkland (alleged widow) 73

MARYLAND LAWS.

See MARRIAGE, 278; LEGITIMACY, 278.

MASSACHUSETTS LAWS.

See MARRIAGE, 114.

MATERIAL SERVICE.

See ATTORNEYS, 429 AND 490.

MEDICAL EXAMINATIONS.

See also JURISDICTION, 348.

1. The third subdivision of section 4 of the act of July 25, 1882, confers discretion on the Commissioner of Pensions, in the exercise of which he may order a claimant to be examined by an expert without an examination before a full board of examining surgeons.

Samuel S. Bowman 348

MENINGITIS.

See DEATH CAUSE.

MEXICAN WAR.

See SERVICE, 21, 110, AND 218.

MICHIGAN LAWS.

See DEPENDENT PARENTS, 297.

MILITARY AGE.

See DESERTION, 286; SERVICE, 12.

MILITIA.

See also SERVICE, 12.

1. The decisions of the Department in the cases of Randolph M. Manley (5 P. D., 295), William Bice (9 P. D., 21), Malter Morris (9 P. D., 462), and all similar cases, which recognize certain militiamen as having been in the service of the United States, should continue to be accepted by the Bureau of Pensions as precedents under which to adjudicate pension claims of the class therein described. (See 20 Op. Atty. Genl., 322.)

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MINORS.

See also COMMENCEMENT, 431; DESERTION, 193; FEE, 496; FEE AGREEMENTS, 150; MARRIAGE AND DIVORCE, 40.

1. The grant in the third section of the act of June 27, 1890, confers title upon the minor children of a soldier separate and independent of that of the widow, and contingent only upon her death or remarriage, and the proviso to said third section relative to the time of the marriage of the widow to the soldier does not extend to or affect the title of the minor children.

Minors of George W. Douglas..... 448

MISSISSIPPI LAWS.

See MARRIAGE, 266.

MUSTER.

See SERVICE, 282.

MYOPIA.

See DISABILITY, 185.

NAVY PENSIONS.

1. This pensioner, being an inmate and beneficiary of the Naval Asylum, Philadelphia, Pa., the money benefit of $13.25 per month, to which he was entitled under section 4756, Revised Statutes, for twenty years' service in the Navy, and in lieu of which he accepted the home in the asylum, was paid to the governor of that institution, by virtue of section 4813, Revised Statutes. He was granted leave for six months in 1896, and during such leave was permitted to receive the $13.25 per month in person. During this leave, also, he applied for and was allowed a pension of $8 per month for service in the Mexican war, under the act of January 29, 1887, but the first payment on this certificate, which included arrears from the date of the act, was paid to the governor of the asylum by the pension agent, and pensioner was only allowed to draw the amount becoming due during the period of his leave from the asylum. It has been held in a decision by the Comptroller of the Treasury (3 Dec. Comp. of Treasury, 568) that "Section 4813, Revised Statutes, requiring the pension of any navy officer, seaman, or marine entitled to a pension to be paid to the Secretary of the Navy during his continuance in a navy hospital, only applies to such pension the benefit of which the pensioner was actually receiving at the time he was in the hospital, and does not include a pension acquired after he left the hospital." Following this ruling, while the pensioner was still constructively a beneficiary of the asylum, although on leave, yet he was not actually an inmate, and the recognition by the asylum authorities and pension agent of his right to draw his pension during the period of such absence carried with it the right to draw all of such pension, including the arrears under the Mexican war act, title to which was determined while he was not an imate of the asylum. The payment of such arrears to the governor or treasurer of the asylum was erroneous, and to this extent the appeal is sustained. Other points in the appeal are overruled in accordance with former decisions (John Spencer, 7 P. D., 152; Richard Ewing, 8 P. D., 44), except in so far as the scaling clause of section 4757, Revised Statutes, is made to apply to section 4756, Revised Statutes.

William Finley..... 410

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NEGLECT.

See ATTORNEYS, 492.

NEW YORK LAWS.

See MARRIAGE, 212.

NOTICE.

See DIVISION OF PENSION, 288.

1. In cases of contest over the division of pension under the act of March 3, 1899, the appellee is entitled to notice of the appeal and a copy thereof and reasonable time in which to file a brief and argument in support of the Bureau action appealed from.

Emily Ellis v. Leroy Ellis 288

2. In the absence of proof of service of an appeal and notice thereof, there being no waiver of service by the appellee, such appeal will be dismissed. Due proof of service may be shown by a written acceptance of service by the appellee or her attorney, or a registry return receipt, signed by the appellee or her attorney, and forwarded by the appellant or his attorney, with an affidavit that on a certain day a copy of the appeal or proposed appeal has been mailed in a registered letter, postpaid, to the appellee at a certain named post-office, naming it, and that the card was returned in acknowledgment of the receipt of such letter; or an affidavit showing that on a certain day and place a copy of the appeal was personally delivered to the appellee or her attorney of record.

Sophia M. Loughry v. John Loughry 523

3. An affidavit stating that a copy of the appeal attached thereto had been sent through the mail to the address of the claimant, as given by the Pension Bureau, is not due proof of service of the appeal, as the proof should show that the same was mailed by registered letter, and that the return registry receipt attached to such proof was the receipt for the registered letter containing a true, full, and complete copy of said appeal and the notice of appeal.

Eliza J. Conover v. William Conover 524

OATH OF ENLISTMENT.

See DESERTION, 286.

ŒDEMA.

See DISABILITY, 505.

OREGON LAWS.

See MARRIAGE, 427.

ORDER 192.

See PRACTICE.

ORIGIN.

See also LINE OF DUTY.

1. This claim was rejected for the reason that, according to the records of the War Department, the appellant became ill in eight days after his enlistment, and that, according to the evidence filed, his sickness was typhoid fever; and that, according to medical authorities, the period of eight days is too short for the incubation of said disease, which was, therefore, not contracted in the service

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and consequently any disability arising therefrom is not pensionable: *Held*, That the facts in the case show that said record is erroneous as to the date of commencement of the soldier's illness and that the statement of the Bureau relative to the period of incubation of typhoid fever is incorrect.

Andrew Forbes 329

PATHOLOGICAL SEQUENCE.

See also DEATH CAUSE, 220, 440, 459, AND 480; DISABILITY, 185; RATE, 317.

1. The soldier's death is shown to have resulted from disease of kidneys, caused by ether anæsthesia, induced for the purpose of operating on a diseased right testicle, for which not pensioned, and for the radical cure of a right inguinal hernia and hydrocele, for which pensioned: *Held*, That inasmuch as the pensioned disabilities were included in the operation leading to the soldier's death, the widow is entitled to pension.

Elisabet Kaufman (widow) 106

2. Appellant is now pensioned at $36 per month on account of a gunshot wound of left leg and resulting total disability of same. The right leg is also shown to be totally disabled, and it is claimed by the appellant to be a result of the condition of his left leg. It is satisfactorily shown that the total disability of the left leg was caused by a chronic ascending neuritis, produced by the gunshot wound, and that the disease has crossed over and involved the right leg, and the disability resulting from said neuritis is such as would warrant the allowance of a higher rate of pension than he now receives.

Enoch Alexander 151

3. The certificate of medical examination, made under appellant's claim for increase, shows that his loss of vision in both eyes is due to intraocular changes caused by a high degree of myopia, which can not be accepted as due to his military service. Action affirmed.

Adolph Becker 185

4. The late officer was pensioned under the general law on account of a gunshot wound which destroyed the right eye and fractured the bones of the orbit. His death is shown to have been due to disease of the brain or meningitis: *Held*, That in the absence of any other more probable cause for infection than the continued disease in the orbit the fatal disease was caused primarily by the gunshot wound.

Rebecca C. Morgan (widow) 220

5. The certificate of medical examination shows the condition of appellant's eyes, on account of which he claims a pension, is due to congenital refractive errors and not to his military service, and that the rejection of his claim under the general law was therefore correct.

George W. Mowery 307

6. The appellant, who is pensioned at the rate of $12 per month for rheumatism and resulting disease of heart, filed a claim for increase, wherein he alleged that varicose veins of both legs had resulted from disease of heart, and claimed that inasmuch as the board of surgeons by which he was examined pursuant to said claim had rated his disabilities at third grade ($24 per month) he was legally entitled to such rate from the date of such examination: *Held*, That the existing rate in the case was fully commensurate with the degree of disability found at said examination as a result of rheumatism and disease of the heart; that the varicose veins of both legs have not been shown to be a sequence, either from a pathologic or mechanical standpoint, of disease of heart, and that

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no authority to determine what rate or rates of pension shall or shall not be allowed in any claim, or class of claims, for pension has ever been conferred upon examining surgeons, either by law, rule, or regulation.

Andrew G. Cunningham 317

7. Death of the soldier (who was over 50 years of age) from cerebral hemorrhage can not be accepted as due to injury to left testicle and varicose veins of right leg and resulting amputation of same above the knee, for which he was pensioned. Senile degeneration of the arteries is universally admitted as the most potent cause of said fatal disease, and this is shown to have existed in this case, so that the burden of proof rests on those advancing a contrary opinion.

Maria Brantigam (widow) 388

8. The soldier's death, at the age of 72 years, of cerebral hemorrhage can not be properly regarded as due to the gunshot wound through the neck incurred thirty-six years prior thereto, and for which he was pensioned.

Emily O. Dilworth (widow) 459

9. The soldier is a pensioner on account of disease of heart, injury to right shoulder and resulting muscular atrophy, paralysis of right arm and resulting total disability of same. He is totally blind from glaucoma, which is alleged to be a result of neuralgia, caused by a fall from his horse, by which he incurred the injury to his shoulder. The facts in the case, supported by medical authority, warrant the conclusion that said blindness is due to spinal injury, or to disease of heart, or both. Action reversed.

James Fitzgarield 462

10. Soldier's death from pulmonary tuberculosis can not be accepted as due to naso-pharyngeal catarrh, on account of which he was pensioned at $2 per month, and it not appearing that catarrh was otherwise a factor in the death cause, nor that said cause was the result of his army service, the rejection of the claim on that ground was proper.

Florence E. Foster (widow) 480

PASS TO HUNT.

See LINE OF DUTY, 55.

PAYMENT.

See also ATTORNEYS, 49.

1. An agent or attorney rendering services in proceedings under the act of March 2, 1895, in behalf of a person entitled under its provisions to the accrued pension on a certificate of pension of a deceased pensioner, must look to the person by whom he is employed for payment for his services. Case of George Aab (9 P. D., 377) is overruled.

John C. Hobson (deceased) 49

PENSION FUND.

See JURISDICTION, 351.

1. A pension fund granted to a pensioner, in the hands of a guardian, is in transitu until it reaches its final destination, and is controlled only by the United States; and the Commissioner of Pensions is invested with the discretionary power necessary to the proper administration of the pension laws, and guardians holding pension funds are subject to his direction, both before and after the death of their wards.
2. All funds which have accumulated in the hands of a guardian by operation of the pension law, and have not been paid to the pensioner or expended in accordance with law in his behalf, are in the nature of accrued pension.

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3. An unexpended pension fund in the hands of a guardian has not, in legal contemplation, been paid to the pensioner, and is an accrued pension.
Commissioner of Pensions 351

PRACTICE.

See also DISCHARGE, 13.

Commencement of Increase.

1. In the adjudication of an original claim for pension under the second section of the act of June 27, 1890, wherein several declarations have been filed, upon the allowance of the claim the pension must commence from the date of filing the declaration under which a pensionable condition was first shown to exist; but if, at the time of the adjudication of such claim, a certificate of medical examination made under the claim shows a condition entitling claimant to a higher rate of pension than existed at the time of the filing of the declaration under which the allowance was made, such original allowance being below the maximum rate, the rate of pension should be increased from the date of such certificate of medical examination (modifying paragraph 6 on page 95 of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898).
Ambrose T. Sanguinette 451

Dropping.

2. In 1891 pension was allowed under the act of June 27, 1890, when the practice required only a final honorable discharge from the service; therefore the desertion of an applicant for pension under said act from his first service was no bar to pension. The practice having been changed so as to require an honorable discharge from all service contracted to be performed during the war of the rebellion, pensioner's name was properly dropped from the rolls on the ground that he was a deserter.
Jerome Woodin, alias Frank Allen 13

Merit Claim not Considered on Appeal as to Fee.

3. The action of the Bureau in a claim for pension upon its merits can not be reviewed upon appeal from action of the Bureau in the matter of fee.
James Hughes (father) 325

No Benefit.

4. A rating of $6 per month is not commensurate with disability shown in this case to be due to underweight, emaciation caused by malnutrition and neurasthenia, nasal catarrh, and a severe case of bronchial catarrh.
5. A claim under the act of June 27, 1890, which is not fully legally adjudicated has not reached final action.
6. No claim under the act of June 27, 1890, should be rejected on the so-called ground of "no benefit," but the pensioner should be allowed to elect under which law he will draw his pension, notwithstanding the fact that the ratings approved for or allowed under each law are not the same.
Martin Wagner 455

Reopening.

7. The certificate of medical examination made under the claim for increase does not show a degree of disability due to pensioned causes that is equivalent to the loss of a hand or a foot for manual labor, which must be shown before the appellant can receive the next higher rate of pension. As the evidence referred to by the appellant was not filed within ninety days after the letter of rejection had been mailed, the action of the Bureau in refusing to reopen the rejected claim was proper and in accordance with the rules of practice.
William W. Wilds 95

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8. The rule of limitation for reopening rejected increase claims in cases where an appeal was filed before the rule had run is suspended during the period from the date of filing the appeal and the date of the decision of the Department thereon.

Jonathan Kinsey 112

Restoration and Increase Claim.

9. The practice of refusing to consider a claim for restoration to a former rate, or one which invokes the act of March 6, 1896, when such are included in a claim for increase under the act of June 27, 1890, is unsound practice. Paragraph 3, page 102, and paragraph 1, page 103, of A Treatise on the Practice of the Pension Bureau, approved by the Secretary of the Interior on April 9, 1898, are accordingly amended.

Andrew J. Brown 122

PRESUMPTIONS.

See DISLOYALTY, 136; EVIDENCE, 43, 102, 197, 344, 437, AND 501; FEE, 215; INCURRENCE, 516; LINE OF DUTY, 84; MARRIAGE, 66, 204, 212, 234, 131, 158, 320, 339, AND 427.

PRIMA FACIE CASE.

See FEE, 392.

PRO RATA FEE.

See FEE, 496.

RANK.

See also SPECIAL ACT, 424.

1. Claimant's son having held the rank of major at the time he was killed in battle, November 27, 1868, she was entitled to a pension of $25 per month under her dependent mother's application filed January 16, 1891, and there was and is no authority of law for rating her pension at $12 per month under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890.

Mary H. Elliott (mother) 34

RATE.

See also AID AND ATTENDANCE, 473; DISABILITY, 505; RERATING, 299.

Adequacy of.

1. The objective conditions—due to rheumatism and disease of heart, and the sequelæ thereof—described in the certificate of the medical examination held August 2, 1899, in pursuance of the claim for increase filed January 28, 1899, show, in the judgment of the Department, the existence at that time of a degree of disability fully equivalent to the loss of a hand or foot, for purposes of manual labor, and it is therefore *Held*, That the allowance of the third-grade rate from the date of the certificate of the said medical examination was and is fully warranted.

Calvin A. Hutchinson 51

2. The appellant, who is pensioned at the rate of $12 per month for rheumatism and resulting disease of heart, filed a claim for increase, wherein he alleged that varicose veins of both legs had resulted from disease of heart, and claimed that inasmuch as the board of surgeons by which he was examined pursuant to said claim had rated his disabilities at third grade ($24 per month) he was legally entitled to such rate from the date of such examination: *Held*, That

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the existing rate in the case was fully commensurate with the degree of disability found at said examination as a result of rheumatism and disease of heart; that the varicose viens of both legs have not been shown to be a sequence, either from a pathologic or mechanical standpoint, of disease of heart, and that no authority to determine what rate or rates of pension shall or shall not be allowed in any claim or class of claims for pension has ever been conferred upon examining surgeons either by law, rule, or regulation.

Andrew G. Cunningham 317

3. The rate of $8 per month, to which this sailor was reduced, appears to be fairly commensurate to the degree of incapacity for earning a support shown to have existed.

Mary M. De Gough (widow) 336

Compounding.

4. The claimant was pensioned at $17 per month for disease of heart. Subsequently a reissue was made to include deafness, but no increase of rate was allowed. The next higher rate to that which the claimant was receiving is third grade, $24 per month. There is no authority of law under which specific rates and general rates can be compounded to make a grade rating.

Niram W. Mallory 165

Rank—Dependent Relative.

5. Claimant's son having held the rank of major at the time he was killed in battle, November 27, 1868, she was entitled to a pension of $25 per month under her dependent mother's application filed January 16, 1891, and there was and is no authority of law for rating her pension at $12 per month under section 4707, Revised Statutes, as amended by the first section of the act of June 27, 1890.

Mary H. Elliott (mother) 34

6. A dependent mother who claims by reason of death, of service origin, is entitled to a rating of but $12 per month when the origin of the death cause was contracted while soldier was a private, notwithstanding the fact that said soldier afterwards became a commissioned officer.

Eliza Hodgman (mother) 18

RECOGNITION.

See ATTORNEYSHIP, 25 AND 422.

RECORD.

See DISLOYALTY, 327; EVIDENCE, 483; JURISDICTION, 226.

REDUCTION.

See RATE, 336.

REFUNDMENT.

See FEE, 215.

REIMBURSEMENT.

See also FRAUD AND MISTAKE, 200.

1. The evidence obtained by a special investigation having clearly shown that the diseases of which the soldier died existed prior to his enlistment and that the claimant was in a position to know of their existence, it is held that her claim for pension on the ground that said diseases originated in the service, was fraudulent, and that the pension under the act of June 27, 1890, was properly withheld for the purpose of recovering the amount paid upon said claim.

Sarah M. Decker (widow) 200

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2. While it is evident that the allowance which it is proposed to recover was due to a clerical error, yet as, from an examination of the evidence, it is doubtful whether the pensioner was not justly entitled to what he received, it is held that recovery by withholding current pension should not be enforced.
Joseph B. Wilson 308

3. Where Bureau officers have fairly acted in the exercise of discretionary judgment in passing upon evidence, in the absence of proof of fraud upon the part of the claimant, no future discovery of testimony which tends to discredit that first acted upon can authorize reimbursement to the Government from accruing pension.
John La Mountain 395

REJECTION.

See PRACTICE, 455.

REJECTED RECRUIT.

See SERVICE, 390.

REMARRIAGE.

See RESTORATION, 338.

1. Section 4708 of the Revised Statutes is applicable to widows pensioned under the first section of the act of January 29, 1887, and upon remarriage of the widow pensioner she becomes no longer entitled to the pension under the provisions of said first section, the provisions of the second section providing for the continuance and enjoyment of such pension during the natural lives of the persons entitled thereto being no longer applicable to her.
Dora V. Otis, now Crowley (as widow) 338

REOPENING.

See also PRACTICE, 95 AND 112.

1. The rule of limitation for reopening rejected increase claims in cases where an appeal was filed before the rule had run is suspended during the period from the date of filing the appeal and the date of the decision of the Department thereon.
Jonathan Kinsey 112

REPAYMENT.

See DIVISION OF PENSION, 255.

1. It having been decided that upon a proper construction of the law and upon the evidence in the case the division of the pension and the payment to the wife of this pensioner, by virtue of the act named, were erroneous and without proper warrant of law, the refusal to restore to him the amount of which he was deprived is likewise illegal, and it is directed that such amount shall be paid to him.
Henry N. Rothery 255

RERATING.

See also FEE, 202.

1. Title to rerating becomes clear only when it appears manifest from the evidence in the case that the action of the Bureau was the result of mistake of law or fact, but adjudications long since made by officers of the Government fairly

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using their discretionary judgment, within its proper scope, should not be disturbed for light and transient causes; and in this case, thirty years having elapsed since first allowance of pension, and increase under many examinations, the rates fixed will not be disturbed.

Alonzo C. Veale (widow completing) 299

RES JUDICATA.

1. Title to rerating becomes clear only when it appears manifest from the evidence in the case that the action of the Bureau was the result of mistake of law or fact, but adjudications long since made by officers of the Government fairly using their discretionary judgment, within its proper scope, should not be disturbed for light and transient causes; and in this case, thirty years having elapsed since first allowance of pension, and increase under many examinations, the rates fixed will not be disturbed.

Alonzo C. Veale (widow completing) 299

2. Where Bureau officers have fairly acted in the exercise of discretionary judgment in passing upon evidence, in the absence of proof of fraud upon the part of the claimant, no future discovery of testimony which tends to discredit that first acted upon can authorize reimbursement to the Government from accruing pension.

John La Mountain 395

RESTORATION.

See also DESERTION, 373; PRACTICE, 122.

1. The practice of refusing to consider a claim for restoration to a former rate, or one which invokes the act of March 6, 1896, when such are included in a claim for increase under the act of June 27, 1890, is unsound practice. Paragraph 3, page 102, and paragraph 1, page 103, of "A treatise on the practice of the Pension Bureau," approved by the Secretary of the Interior on April 9, 1898, are accordingly amended.

Andrew J. Brown 122

2. Section 4708 of the Revised Statutes is applicable to widows pensioned under the first section of the act of January 29, 1887, and upon the remarriage of the widow pensioner she becomes no longer entitled to the pension under the provisions of said first section, the provisions of the second section providing for the continuance and enjoyment of such pension during the natural lives of the persons entitled thereto being no longer applicable to her.

Dora V. Otis, now Crowley (as widow) 338

3. It appearing from the official record of this appellant's military service, and from the other evidence in the case, that at the date he incurred the disabilities in the service on account of which he was formerly pensioned he was in desertion from a prior term of service, and was at said time absent from his proper command without leave and not in the line of duty, he is not entitled to be restored to the pension roll under the present rulings and decisions of this Department. See cases of John Norton (9 P. D., 382) and widow of John Sullivan (10 P. D., 55).

Lewis Rankin 373

RETIRED OFFICER.

1. A soldier retired after thirty years' service can not be considered as still in the service for pensionable purposes without due proof of the origin of disability in line of duty. The service contemplated by the law is active service, and disability or death must be shown to be due thereto.

Catherine Meade (widow) 28

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RETROACTIVE LAWS.

See CONSTRUCTION, 77 AND 90.

REVIEW.

See APPEAL, 519.

SABINE INDIAN WAR.

See SERVICE, 177.

SECTION 4702, REVISED STATUTES.

See SPECIAL ACT, 424.

SECTION 4705, REVISED STATUTES.

See MARRIAGE, 181.

SECTION 4707, REVISED STATUTES.

See DEPENDENT PARENTS, 247; FEE, 514.

SECTION 4716, REVISED STATUTES.

See DISLOYALTY, 64, 124, 136, 241, 290, AND 327.

SECTIONS 4713, REVISED STATUTES.

See COMMENCEMENT, 175.

SECTIONS 4756, 4757, REVISED STATUTES.

See NAVY PENSIONS, 410.

SERVICE.

See also DESERTION, 332; NOTICE, 523.

Board of Enrollment.

1. This appellant's service was rendered as a commissioner of the board of enrollment of the Second Congressional district of the State of Missouri. He filed an application for pension, under the provisions of the general pension law, on account of disease alleged to have been contracted during said service; and also an application for pension, under the provisions of the second section of the act of June 27, 1890, on account of said service: *Held*, That there is no provision of law granting pension for disease contracted while serving as commissioner of board of enrollment, and that such service is not a pensionable service under the provisions of the second section of the act of June 27, 1890.

Lucius De Witt Morse 183

Militia.

2. The decisions of the Department in the cases of Randolph M. Manley (5 P. D., 295), William Bice (9 P. D., 21), Walter Morris (9 P. D., 462), and all similar cases, which recognizes certain militiamen as having been in the service of the United States, should continue to be accepted by the Bureau of Pensions as precedents under which to adjudicate pension claims of the class therein described. (See 20 Op. Atty. Genl., 322.)

Instructions 12

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Captain Beaty's Scouts.

3. The act of July 14, 1870, for the relief of Captain Beaty's company of Independent Scouts was manifestly passed to enable deserving members thereof to obtain the benefit of pension laws then in force for disabilities incurred in the service and line of duty, and its scope can not be broadened to include the essentially different conditions of title to pension contemplated by the act of June 27, 1890, and claimant, never having been legally mustered into the United States service and honorably discharged therefrom, is not pensionable under said last-mentioned act. Citing case of James Threet (9 P. D., 297).
Russell Stephens 141

Deserter—Age.

4. This claimant being over 18 but under 21 years of age at the date of his enlistment, in June, 1861, such enlistment was valid and binding upon him, and any disability incurred by him during the term of such enlistment, but after his desertion therefrom and while serving in the United States Navy, was not contracted in line of duty.
Edward E. Napier 240

As Substitute.

5. Claimant was enlisted as a substitute in the service of the United States and was carried on the rolls as such for a period of more than ninety days, when he was discharged as rejected for disability by a board of inspection. He was not assigned to any company, and he did not serve in the military service in the sense contemplated by the act of June 27, 1890, and is not entitled to pension. (See cases of Rathton, 9 P. D., 162, and Ransom, 5 P. D., 183.)
John S. Robinson 390

Enrollment and Muster as Wagon Master.

6. It appearing from the official record in the War Department of the deceased soldier's military service that he was duly enlisted and mustered into the military service of the United States, and subsequently honorably discharged therefrom, it is immaterial whether he was enlisted and served as a "wagon master" or not; he was an enlisted man in the military service of the United States, and as such occupied a pensionable status under the law. The rejection of the appellant's claims for pension as the widow of the soldier upon the ground that he had rendered no service in the military or naval service of the United States was, therefore, erroneous, and is reversed.
Margaret Griffin (widow) 282

Indian Wars.

7. The Sabine Indian war not being one of the wars named in the act of July 27, 1892, the soldiers who served therein are not entitled to pension under said act.
R. G. English 177

Mexican War.

8. It appearing from the official record of the military service of the deceased soldier during the Mexican war, and from the testimony on file in this case, that the soldier was duly enlisted for service in the war with Mexico as a recruit for a regiment then on duty in Mexico, and that he served for a term of more than sixty days under orders and "en route" to the seat of war to join his command, such service fulfilled the conditions of pensionable title required by the provisions of the act of January 29, 1887, and entitles his widow to pension thereunder.
Meta Thornton (widow) 21

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9. It appearing from the evidence that the deceased sailor did not serve for sixty days with the Navy of the United States in Mexico, or on the coasts or frontier thereof, or en route thereto in the war with that nation, this appellant is not entitled to pension as his widow under the provisions of the act of January 29, 1887.

Matilda I. Kennedy (widow) 110

10. The mere fact that claimant served as a sailor during the war with Mexico is not enough to entitle him to a pension under the act of January 29, 1887, but he must have served sixty days in Mexico, on the coasts or frontier thereof, or en route thereto, or actually engaged in battle, or been personally named by a resolution of Congress for specific service rendered therein.

Thomas McGinniss 218

Period of Service.

11. This soldier enlisted in the Regular Army of the United States on April 22, 1848, less than sixty days prior to the termination of the war with Mexico, on May 30, 1848. Consequently his service during said war did not fulfill the requirements of the act of January 29, 1887, and he is not entitled to pension thereunder.

Alfred Williams 163

12. While soldier's discharge and a report from the War Department show that he served from January 27 to April 14, 1864, other records show him present with his company, assigned to light duty, in "camp sick," and discharged May 21, 1864, and therefore in the military service from enlistment to May 21, 1864, and therefore in the military service for ninety days *during* the late war of the rebellion.

Martin Collins 206

13. As the claimant was with his command only a week or two and then went home and remained there until the company was about to be mustered out, his place in the ranks being in the meantime taken by another man, who answered to his name at roll call, it not being shown that he received a sick furlough, as alleged, he did not serve ninety days within the meaning of the act of June 27, 1890, and was not entitled to pension thereunder.

John R. Trout 435

Proof of Service of Notice.

14. In the absence of proof of service of an appeal and notice thereof, there being no waiver of service by the appellee, such appeal will be dismissed.

Sophia M. Loughry v. John Loughry 523

Special Act as to Service.

15. The soldier having been declared by special act of Congress to be an officer in the military service of the United States, and given the right to prosecute a claim for pension under the general law, although he is not shown to have been mustered nor recognized by the War Department, and having been pensioned under the general law at total of rank for disability contracted in service, the status and privilege extend to the widow, and she is pensionable under the general law if the officer's death was the result of the disability for which he was pensioned, as provided by section 4702, Revised Statutes.

Corinne R. Strickland (widow) 424

SPECIAL ACT.

1. The soldier having been declared by special act of Congress to be an officer in the military service of the United States, and given the right to prosecute a claim for pension under the general law, although he is not shown to have been mustered nor recognized by the War Department, and having been pensioned under the general law at total of rank for disability contracted in serv-

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ice, the status and privilege extend to the widow, and she is pensionable under the general law if the officer's death was the result of the disability for which he was pensioned, as provided by section 4702, Revised Statutes.
Corinne R. Strickland (widow) 424

SURGICAL OPERATION.

See DEATH CAUSE, 106.

TENNESSEE LAWS.

See MARRIAGE, 294; LEGITIMACY, 294.

TYPHOID FEVER.

See also ORIGIN, 329.

1. This claim was rejected for the reason that, according to the records of the War Department, the appellant became ill in eight days after his enlistment, and that, according to the evidence filed, his sickness was typhoid fever; and that, according to medical authorities, the period of eight days is too short for the incubation of said disease, which was, therefore, not contracted in the service, and consequently any disability arising therefrom is not pensionable: *Held*, That the facts in the case show that said record is erroneous as to the date of commencement of the soldier's illness, and that the statement of the Bureau relative to the period of incubation of typhoid fever is incorrect.
Andrew Forbes 329

VICIOUS HABITS.

See also EVIDENCE, 344.

1. Vicious habits can not be presumed in case of an injury unless there is something concerning the nature or character of the injury which warrants such a presumption, or unless the evidence shows certain facts which are sufficient to raise such a presumption. Where neither the nature of the injury nor the evidence adduced raises such a presumption, the testimony of two credible witnesses, to the effect that claimant is now a man of good habits, and that they do not believe, and have no reason to believe, that the said injury was due to vicious habits, will be considered as sufficient to meet the requirements of the statute, provided always that the claimant is a man of good repute for veracity, and that he shows that no better evidence is obtainable by him.
Benjamin F. Peterman 344

VESTED RIGHT.

1. The right to a pension is not a vested one.
Eliza Hodgman (mother) 18

VIRGINIA LAWS.

See MARRIAGE, 167.

WAGON MASTER.

See SERVICE, 282.

WAR WITH SPAIN.

See DEPENDENT PARENTS, 247.

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